

Once, Twice, Three Times A Dismissal

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Ohio workers' compensation attorneys who practice litigation have likely stipulated to dismiss an Employer Notice of Appeal case and later re-filed, perhaps even several times on the same case.¹ A careful review of the Ohio "savings statute"² and case law interpreting the statute shows that this can be risky for the injured worker at times. Under the "savings statute", a plaintiff may re-file an action one year from the date a dismissal occurs otherwise than upon the merits.³ Additionally, the Civil Rules allow a plaintiff to dismiss all claims asserted by the plaintiff against a defendant by filing a stipulation of dismissal signed by all parties who have appeared in the action.⁴

Ohio workers' compensation attorneys should use caution when dismissing a case with the intent to refile where there has been a Stipulated Dismissal or a Court Ordered Dismissal without prejudice. For example, in a case where the injured worker could file a Notice of Dismissal and re-file, a third complaint cannot be re-filed if the first dismissal was stipulated and the second was a Notice of Dismissal. Moreover, a third complaint cannot be filed if the court issues the second dismissal in a re-filed case – even if the dismissal is without prejudice for a reason other than on the merits.

In Ohio, plaintiffs can use the "savings statute" only once, even if one of the dismissals was stipulated.⁵ In Boggs v. Baum,⁶ the parties to a legal malpractice case stipulated to dismiss the first complaint and re-file.⁷ The Plaintiff timely refiled a complaint but ultimately filed a Notice of Dismissal without Prejudice.⁸ The Tenth District Court of Appeals upheld the trial court's decision to dismiss the third complaint because the first stipulation did not act to toll the statute of limitations.⁹ The court agreed that the parties could have tolled the statute and refiled if the order of the dismissals had been reversed.¹⁰ However, reversing the order does not buy the plaintiff back its original chance to dismiss and re-file using the Savings Statute. The court reasoned that to rule otherwise would mean a plaintiff could use the savings statute to keep a cause of action alive well beyond the statute of limitations, directly contradicting the purpose of the savings statute as "neither a tolling provision nor a statute of

¹ See court cases filed under O.R.C. § 4123.512.

² R.C. § 2305.19.

³ For the seminal case on the double dismissal rule, see Olynyk v. Scoles, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254. "Courts have further held in cases presenting slightly different scenarios that the double-dismissal rule operates only when two Civ.R. 41(A)(1)(a) notice dismissals are involved and not in other situations. See, e.g., Nemeth v. Aced, Hobbs, Wassell & O'Connor (Feb. 22, 1996), 10th Dist. No. 95APE06-768, 1996 WL 76319, *4 (double-dismissal rule does not apply when first dismissal was by stipulation); Hershiser v. BOS Corp. (1990), 69 Ohio App.3d 186, 189, 590 N.E.2d 323 (double-dismissal rule not triggered when first dismissal was by stipulation); Graham v. Pavarini (1983), 9 Ohio App.3d 89, 93-94, 9 OBR 140, 458 N.E.2d 421 (double-dismissal rule does not apply when neither dismissal was a notice dismissal)."

⁴ Ohio R. Civ. P. 41(A)(1)(b).

⁵ See Boggs v. Baum, et al., 10th Dist. Franklin No. 10AP-864, 2011-Ohio-2489; R.C. § 2305.19

⁶ Boggs v. Baum, et al., 10th Dist. Franklin No. 10AP-864, 2011-Ohio-2489.

⁷ Id. at *1.

⁸ Id.

⁹ Id. at *7.

¹⁰ Id. at *8-9.

limitations unto itself.”¹¹ The court also indicated that if the Stipulated Dismissal would not have included the intent to refile language, the defendants could have been equitably estopped from invoking the statute of limitations if that Dismissal had been the second one filed.¹²

Much like a stipulated dismissal, a court order dismissing a case other than on the merits and without prejudice, acts as a dismissal by the plaintiff under the savings statute analysis. The Twelfth District Court of Appeals of Ohio held in Johnson v. Jefferson¹³ that two dismissals by the Court for reasons not on the merits bar a third re-filed complaint, even if the dismissal orders state they are without prejudice.¹⁴ In Johnson, the injured worker appealed to court on an additional allowance and the case was transferred to a different county after filing.¹⁵ Shortly thereafter, the court dismissed the case without prejudice.¹⁶ Less than one year later the case was timely re-filed under the savings statute.¹⁷ The trial court threatened dismissal with prejudice unless an IME was performed within the following 45 days.¹⁸ The IME was not performed and the trial court dismissed the case without prejudice.¹⁹ A third complaint was filed less than a year following the dismissal.²⁰ The defendant filed a motion for summary judgment.²¹ The trial court granted the motion and dismissed the case.²² The Court of Appeals upheld the trial court’s decision because the first two dismissal orders without prejudice, although involuntary, allowed the Plaintiff to use the savings statute twice by re-filing a third complaint which is barred by the language of the statute and case law interpreting the rule.²³ Here, had the parties agreed to a dismissal and re-filing, a third re-filed complaint would have been proper.

A plaintiff is not ultimately entitled to a Notice of Dismissal and re-file, even if the plaintiff has never filed one in the case. Proceed with caution anytime you dismiss a post-Senate Bill 7 Employer Appeal. When stipulating to dismiss a case, use language that indicates the parties agree to re-file the case.²⁴ If you stipulate to dismiss once, all future dismissals should be stipulated or you will be barred by the statute of limitations when re-filing. Check your file to make sure no court dismissal was filed before you dismiss the case with the expectation of re-filing. Prevent court dismissal at all costs as it will most certainly count as a strike against the Plaintiff and not the Employer, regardless of who filed the appeal to court.

¹¹ Id. at *7, citing Hancock v. Kroger Co., 103 Ohio App.3d 266, 269, 659 N.E.2d 336 (10th Dist. 1995).

¹² Id. at *8-9, citing Turner v. C. & F. Prods. Co., Inc., 10th Dist. Franklin No. 95APE02-175, 1995 WL 578129 (Sept. 28, 1995) & Hutchinson v. Wenzke, 131 Ohio App. 3d 613, 723 N.E.2d 176 (2nd Dist. 1999).

¹³ Johnson v. Jefferson Industries Corp., et al.,

¹⁴ Johnson v. Jefferson Industries Corp., et al., 2015-Ohio-5035, 60 N.E.3d 424 (12th Dist.).

¹⁵ Id. at 424.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id. at 427.

²⁴ In Boggs, the language used on the Stipulated Dismissal acceptable to the court included “The parties agree that: this dismissal is otherwise than upon the merits; the statute of limitations on Plaintiff’s claims has already expired; the anticipated re-filing of the Complaint will be timely, pursuant to the Ohio Savings Statute, if said filing is accomplished within one year of the date this Stipulated of Dismissal is filed with the Court;...” Boggs at *9.