

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

JERRY ACKLEY,	:	MEMORANDUM OPINION
Appellee,	:	
- vs -	:	CASE NO. 2010-L-127
MARSHA P. RYAN, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION,	:	
Defendant,	:	
DIE CO., INC.,	:	
Appellant.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 08 CV 003807.

Judgment: Appeal dismissed.

Ernest A. Lallo, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Appellee).

Natalie F. Grubb and John S. Lobur, Grubb & Associates, L.P.A., 437 West Lafayette Road, Ste. 260-A, Medina, OH 44256 (For Appellant).

MARY JANE TRAPP, J.,

{¶1} This appeal ensued on October 27, 2010, when appellant, Die Co., Inc., filed a notice of appeal from an October 6, 2009 judgment entry of the Lake County

Court of Common Pleas. In the October 6 entry, the trial court ordered the case dismissed without prejudice.

{¶2} The docket in this matter reveals that on March 7, 2007, the employer/appellant, Die Co., Inc., filed a notice of appeal with the Lake County Court of Common Pleas pursuant to R.C. 4123.512 from a February 2007 decision of the Industrial Commission of Ohio. On June 8, 2007, employee/appellee, Jerry Ackley, filed a motion for leave of court to file instant his complaint appealing from the same February 2007 decision of the Industrial Commission, and subsequently filed that complaint on June 22, 2007. Mr. Ackley voluntarily dismissed that action on December 6, 2007.

{¶3} On December 3, 2008, Mr. Ackley refiled the action. On October 6, 2009, Mr. Ackley filed a “Motion for Court dismissal under [Civ.R.] 41(A)(2).” On that same date, the trial court issued an entry which stated that the case was dismissed “*** as appellant is unavailable for trial, without prejudice, otherwise then on the merits with a right to re-file.”

{¶4} Appellant filed an appeal with this court from that decision on October 26, 2009. We dismissed the action for lack of a final appealable order since the matter could be refiled by Mr. Ackley within a year under the savings statute. *Ackley v. Ryan*, 11th Dist. No. 2009-L-143, 2010-Ohio-477, at ¶8-9, citing to *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 126-127, 2009-Ohio-360. Appellant has filed the instant appeal from the same October 6, 2009 entry, in which the trial court dismissed its case without prejudice.

{¶5} Pursuant to *Bingham v. Evenflo Co., Inc.*, 2d Dist. No. 09CA0039, 2010-Ohio-2264, at ¶13, the voluntary dismissal of the complaint by an employee does not affect an employer's notice of appeal, and the court of common pleas retains jurisdiction until the refiling of an employee's complaint. Therefore, if the complaint is not refiled by the employee, an employer would have to seek a final remedy by filing a dispositive motion with the common pleas court and not with the appellate court. See, generally, *Bingham*, supra; see, also, *Gonzalez v. Alcon Industries, Inc.*, 8th Dist. No. 92274, 2009-Ohio-2587.

{¶6} Based on the foregoing, this court lacks jurisdiction to consider this appeal.

{¶7} Appeal dismissed

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.