

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

HYATT M. RHINE)	CASE NO. CV 11 769886
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	<u>JOURNAL ENTRY DENYING</u>
)	<u>THE DEFENDANT'S MOTION</u>
STEPHEN BUEHRER, etc.)	<u>TO DISMISS</u>
)	
Defendant)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff Hyatt M. Rhine filed this lawsuit on November 22, 2011, for himself and a putative class of people similarly situated who have been reimbursed by Ohio's Bureau of Workers' Compensation for prescriptions in an amount less than they were required to pay out-of-pocket because of the BWC's failure to authorize payment at the time of purchase. Defendant Stephen Buehrer, the administrator of the BWC, filed a motion to dismiss on February 3, 2012. Since then, the plaintiff opposed the motion, the defendant filed a reply brief in support, and the plaintiff filed a surreply in opposition. The plaintiff has also filed three notices of supplemental authority citing to appellate cases decided after the briefing was complete. This entry follows.

THE PLAINTIFF'S COMPLAINT

Factual allegations

Rhine was injured at work. He made a claim for workers' compensation benefits that was allowed by the BWC. As part of his treatment for the injury his doctor prescribed medication and Rhine went to a local Rite Aid pharmacy to fill the prescriptions.

Rite Aid is an approved pharmacy in the BWC's out-patient pharmacy benefit program and the drugs were prescribed for an allowed condition. Nevertheless, when Rhine went to Rite Aid to get the prescriptions the BWC's third-party pharmacy benefits manager denied coverage. The benefits manager is charged with making a point-of-purchase determination to accept or reject coverage for prescriptions. But that decision is not final: the benefits manager's determination is subject to administrative review and the ultimate decision on whether the BWC will cover the cost of a prescription rests with the industrial commission.

However, where a pharmacy benefits manager denies coverage when the injured worker is at the drug store counter, the pharmacy demands payment as a cash customer. Cash customers are typically charged more for drugs than the pharmacy would be paid under the BWC's benefit program. And so it was in Rhine's case. He alleges that, over time, he paid \$1,046.93 out-of-pocket for prescriptions where coverage was initially denied by the pharmacy benefits manager at the time of sale but later approved. Once coverage was approved, he was then reimbursed by the BWC only the amount allowed under its benefit schedule for the prescribed drugs. That reimbursement amounted to just \$551.20, leaving him with unreimbursed expenses of \$595.73 that he would not have incurred if coverage had been approved right away.

Rhine alleges that the BWC has been “unjustly enriched”¹ at his expense in an amount equal to the difference between the amount he paid and was reimbursed, i.e. \$595.73.

Rhine’s first lawsuit

Rhine and another injured worker, Stephen Patterson, initially filed a lawsuit in this court against Rite Aid.² The BWC was not a party. That case was removed to the United States District Court for the Northern District of Ohio, Eastern Division, as case number 1:10 CV 589. In that complaint Rhine alleged, among other claims, that Rite Aid violated what he refers to as the “balance billing” statute, Ohio Revised Code section 4121.44(K). That section prohibits a health care provider from charging or collecting any amount for covered services that is in excess of the bureau’s allowed amount.

The federal lawsuit was dismissed when the court granted Rite Aid’s motion pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure to dismiss for failure to state a claim upon which relief can be granted.

Causes of action

The complaint here sets forth five causes of action: violations by the defendant of portions of the workers’ compensation statute that entitle him to “full compensation for the cost of care”³ of his work injuries; unjust enrichment; violations of constitutional equal protection guarantees; violations of constitutional due process guarantees; and a declaratory judgment that the BWC’s retention of the difference between the amount paid out-of-pocket and the

¹ Complaint, ¶32.

² Case number CV 10 717581.

³ Complaint, ¶48.

reimbursed amount is unlawful. For relief, the plaintiff seeks restitution of his unreimbursed payment and an injunction prohibiting the BWC's practice of "balance billing."⁴

THE DEFENDANT'S MOTION TO DISMISS

The BWC offers two general justifications to dismiss the complaint. First, the defendant asserts that the complaint should be dismissed under Rule 12(B)(1) of the Ohio Rules of Civil Procedure because this court has no jurisdiction over what is either properly a mandamus claim against an agency of the state's executive branch of government or a claim against the state that can only be heard by the court of claims. Second, the complaint fails, for various reasons, to state a claim for which relief can be granted and should be dismissed under Civil Rule 12(B)(6).

As a third reason justifying dismissal, the defendant argues that venue is not proper here because the bureau's administrator can only be sued in the Franklin County Court of Common Pleas.

Civil Rule 12(B)(1)

Civil Rule 12(B)(1) allows for the dismissal of a complaint based upon the court's lack of jurisdiction over the subject matter. In ruling on a Civil Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction, the trial court determines whether the claim raises any action cognizable in that court. *Hull v. Charter One Bank, N.A.*, 8th Dist. No. 99308, 2013-Ohio-2101, ¶7.

The defendant argues initially that the claim raised by Rhine is really an appeal of the industrial commission's decision concerning the extent of his disability and therefore cannot be

⁴ *Id.*, page 15.

raised in the court of common pleas. He then seeks dismissal on the basis that the complaint is a claim for money damages that can only be heard by the court of claims. These arguments will be addressed in order.

R.C. 4123.512 provides, in pertinent part:

The claimant . . . may appeal an order of the industrial commission made . . . in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted[.]
(Emphasis in italics added.)

The defendant cites two cases – *Szabo v. Cleveland Clinic Found.*, 19 Ohio App. 3d 70 (8th Dist. 1984) and *State ex rel. Bosch v. Indus. Comm.*, 1 Ohio St. 3d 94 (1982) – for the proposition that once a worker’s right to participate in the fund for a workplace injury is decided then any other decision of the BWC pertains to “extent of disability” and cannot be appealed under R.C. 4123.512.

In *Szabo*, the industrial commission allowed the claimant to participate for a contusion to her upper arm but disallowed an additional claimed condition for cervical radiculopathy. She appealed to the trial court, which granted the commission’s motion to dismiss based on a lack of subject matter jurisdiction under the version of R.C. 4123.512 then in effect. *Szabo* appealed that dismissal and the court of appeals – while indeed affirming that “the statute [conferring jurisdiction in the common pleas court] is meant to prevent appeals related solely to the amount of compensation a claimant is to receive for a certain injury” – reversed the trial court, finding that the common pleas court did have jurisdiction to hear *Szabo*’s appeal.

As for *Bosch*, that case involved two claimants paralyzed by workplace injuries. Each claimant was approved for total disability benefits arising from paraplegia. Later, both men applied for additional compensation for the loss of use of their legs. The requests were denied

and mandamus actions filed. Germane to this case, the Supreme Court reiterated that “a decision affecting a claimant’s compensation, once claimant’s right to participate in the fund had previously been established, is a decision as to the extent of disability and is not appealable.” The Supreme Court also concluded that an action in mandamus was the proper means “to test the industrial commission’s exercise of its discretion.”

But the plaintiff here does not dispute that only decisions involving the right to participate are appealable to the common pleas court. Instead, the plaintiff argues that the complaint’s causes of action are not appeals of the extent of disability in his case, but are causes of action for constitutional violations and for unjust enrichment, none of which fall under R.C. 4123.512. Specifically, the plaintiff claims that “the issues in this case involve the manner in which the BWC designed the pharmacy benefits program so as to deny some injured workers due process and equal protection”⁵ and that many cases in Ohio have “approved relief in the form of a declaratory judgment and other equitable relief when the plaintiffs do not challenge a particular discretionary administrative decision.”⁶

Among the cases cited by the plaintiff are: an opinion of the Tenth District Court of Appeals that the common pleas court, not the court of claims, has jurisdiction over an action against an administrative agency for a declaratory judgment;⁷ an Ohio Supreme Court decision that a common pleas court has jurisdiction over an action against the BWC that seeks restitution of funds wrongfully held by the state;⁸ another case from the Tenth District on appeal from the common pleas court where the BWC never objected to the trial court’s

⁵ Plaintiff’s brief in opposition to the motion to dismiss, page 10.

⁶ *Id.*

⁷ *Interim Healthcare of Columbus, Inc. v. Ohio Dept. of Admin. Svcs.*, 10th Dist. No. 07 AP 747, 2008-Ohio-2286.

⁸ *Santos v. Ohio Bureau of Workers’ Comp.*, 101 Ohio St. 3d 74 (2004).

jurisdiction over a declaratory judgment lawsuit;⁹ an Ohio Supreme Court case countenancing the prosecution in the common pleas court of a complaint against an administrative agency alleging equitable and constitutional claims;¹⁰ and a case where the Ohio Supreme Court affirmed the dismissal of a mandamus lawsuit by an injured worker against the BWC because the worker had an adequate remedy at law in the form of constitutional and declaratory claims.¹¹

Common pleas courts have subject matter jurisdiction over actions for damages, for declaratory relief, and for injunctive relief, all of which are alleged in the complaint here. A Civil Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction should be granted only if it does not state a claim cognizable in the court. *Hull*, supra. Based upon the current state of the record, there is at best a factual dispute over the substance of the plaintiff's claims. That dispute is not enough to defeat this court's exercise of jurisdiction, and the motion to dismiss on the basis that the complaint is an appeal of the extent of Rhine's disability over which this court has no subject matter jurisdiction is denied.

The court of claims was established by the enactment of R.C. Chapter 2743. Pursuant to R.C. 2743.02(A)(1), the state waived sovereign immunity and consented to be sued as follows:

The state hereby waives its immunity from liability . . . and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties . . . *To the extent that the state has previously consented to be sued, this chapter has no applicability.* (Emphasis in italics added.)

⁹ *Ohio Hospital Ass'n v. Ohio Bureau of Workers' Comp.*, 10th Dist. No. 06 AP 471, 2007-Ohio-1499.

¹⁰ *Ohio Academy of Nursing Homes, Inc. v. Barry*, 56 Ohio St. 3d 120 (1990).

¹¹ *State ex rel. McCullough v. Indus. Comm.*, 94 Ohio St. 3d 156 (2002).

The Ohio Supreme Court has held that to the extent that any actions were permitted against state agencies in a court of common pleas prior to the enactment of Chapter 2743, those actions may be maintained against the state in a court of common pleas subsequent to the enactment of the law. *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.*, 28 Ohio St. 3d 317, 319-320 (1986).

As summarized above, Rhine's complaint alleges causes of action for a declaratory judgment, constitutional violations and unjust enrichment with an accompanying request for an injunction. Since declaratory judgment and injunction actions were permitted against the state prior to the enactment of Chapter 2743, the court of common pleas has jurisdiction over those claims. See *Armstrong/Mahan Joint Venture v. Ohio Dep't of Administrative Services*, 10th Dist. No. 87AP-1073 (Dec. 31, 1987). Moreover, constitutional claims are not actionable in the court of claims. *Bleicher v. University of Cincinnati College of Medicine*, 78 Ohio App. 3d 302, 306 (10th Dist. 1992). Finally, a claim for unjust enrichment is an equitable cause of action and the state was subject to being sued in equity before the creation of the court of claims. See, e.g., *Johnson v. Trumbull Corr. Inst.*, 2005-Ohio-1241, ¶8 (Ct. of Cl. 2005). For these reasons the court of claims does not have jurisdiction over the complaint and the motion to dismiss on the basis that it does is denied.

Civil Rule 12(B)(6)
Res judicata

Civil Rule 12(B)(6) authorizes a defendant to move to dismiss a complaint where it does not state a claim upon which relief can be granted. In deciding a motion to dismiss for failure to state a claim, a court must accept all factual allegations as true and can only grant the motion if it appears beyond all doubt that the plaintiff can prove no set of facts to support a

finding in his favor. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

In support of this prong of the motion to dismiss, the BWC argues that Rhine's previous lawsuit against Rite Aid constitutes *res judicata* and precludes him from litigating the claims asserted against the BWC here.

Initially, it is worth noting that the defense of *res judicata* may not be raised by a motion to dismiss under Civil Rule 12(B). *State ex rel. Freeman v. Morris*, 62 Ohio St. 3d 107, 109 (1991). For that reason alone, the motion to dismiss cannot be granted on the basis of *res judicata*.

But the argument is also unpersuasive on its merits. The previous lawsuit was against Rite Aid only and included claims for violations of R.C. 4121.44(K) and R.C. 1345.01 *et seq.* (the consumer sales practices act), breach of contract, and declaratory relief. The trial court granted Rite Aid's motion to dismiss on the basis that the balance billing statute did not create a private cause of action.

Under the doctrine of *res judicata*, a valid, final judgment bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject matter of the prior action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382 (1995). The doctrine bars a claim when the following four elements are met: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) there is a second action that involves the same parties, or their privies, as the first action; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of a transaction or

occurrence that was the subject matter of the first action. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 84. Furthermore:

The doctrine of *res judicata* can be divided into two subparts: claim preclusion and issue preclusion. (Citation omitted). Under claim preclusion, a party who prevails in one action is precluded from relitigating the same cause of action against the same party. (Citation omitted). Under issue preclusion, also known as collateral estoppel, the party is precluded from relitigating in a second action an issue that has been actually and necessarily litigated and determined in a prior action. (Citations omitted). *Johnson v. Cleveland City Sch. Dist.*, 8th Dist. No. 94214, 2011-Ohio-2778, ¶36.

The facts here do not support a finding of *res judicata*. Claim preclusion does not apply because the BWC was not a party to the first action, nor can Rite Aid, the defendant in the first case, and the BWC fairly be characterized as privies for purposes of the plaintiff's claims. Collateral estoppel does not apply for the same reason and because this case does not assert any claim actually determined in the first case. The only thing determined in the first case is that R.C. 4121.44(K) did not create a private cause of action in favor of an aggrieved workers' compensation claimant against a private health care provider who charges the worker an amount in excess of the bureau's allowed amount. No similar claim is being made in this case.

The defendant's own assertion that "the BWC is not collaterally estopped from opposing the holdings"¹² in Rhine's lawsuit against Rite Aid also suggests the inapplicability here of collateral estoppel, if not the defendant's bad faith in raising the issue in the first place. If the issues in this case were "necessarily litigated and determined" in the BWC's favor in the first case then why should only Rhine be precluded from raising them again here?

¹² Defendant's motion to dismiss, p. 10, footnote 7.

Because *res judicata* is not a defense that can be decided on a motion to dismiss and because the complaint is not obviously barred by *res judicata*, the defendant's motion to dismiss on that basis is denied.

Civil Rule 12(B)(6)
The plaintiff cannot question the defendant's exercise of discretion

The defendant separately moves for dismissal under Civil Rule 12(B)(6) by arguing that the BWC created the rules for reimbursement under its statutory authority to pay for medicine "as the administrator deems proper." R.C. 4123.66(A). As with the defendant's claim that a common pleas court has jurisdiction under R.C. 4123.512 to hear only appeals involving the worker's right to participate in the fund, the plaintiff does not deny that the administrator has discretion to decide whether and how much it will pay for particular kinds of medicine.¹³

Instead, the plaintiff casts his complaint as alleging that the administrator has exercised his discretion in a way that unconstitutionally deprived him of the equal protection of the law by arbitrarily treating workers who are initially denied drug coverage by a third-party administrator, but later approved for that coverage, differently than workers whose coverage is initially allowed. To accept that allegation as true – the appropriate standard in the context of a Civil Rule 12(B)(6) motion – and still grant the defendant's motion to dismiss would, in essence, require the court's approval of the administrator's claim that nobody and nothing, including the federal and state constitutions, constrains his discretion. Given the patent ludicrousness of that proposition and the Ohio Supreme Court's caution that a Civil Rule

¹³ Br. in opp. at p. 14: The BWC certainly may establish a maximum price for prescription medications; that is not the issue here.

12(B)(6) motion “is viewed with disfavor and is rarely granted,”¹⁴ the second part of the defendant’s Civil Rule 12(B)(6) motion to dismiss is denied.

Civil Rule 12(B)(6)
No possible constitutional violations

As the third part of his Civil Rule 12(B)(6) motion, the administrator argues that Rhine cannot possibly prove any set of facts to support the claims that he has been unconstitutionally denied due process and the equal protection of the law. It might be accurate to say that Rhine *will not* prove his constitutional claims, but to agree that he *absolutely cannot* prove them under any circumstances is, as noted above, akin to finding that the administrator is not bound by the federal or state constitutions. In other words, and with no intent to give short shrift to his argument, this portion of the defendant’s motion to dismiss raises factual issues best suited for resolution by a summary judgment motion or trial and is denied.

Civil Rule 12(B)(6)
Claim for unjust enrichment

The BWC separately seeks the Civil Rule 12(B)(6) dismissal of the unjust enrichment cause of action because Rhine has failed to allege that he conferred a benefit on the defendant, thus defeating his ability to prove an essential element of the claim. Additionally, even assuming he has properly alleged the elements of unjust enrichment, the defendant argues that Rhine’s purchase of the drugs under an express contract with Rite Aid precludes a lawsuit on the equitable claim for unjust enrichment.

The elements of an unjust enrichment claim are: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the

¹⁴ *Wilson v. Riverside Hospital*, 18 Ohio St. 3d 8, 10 (1985).

benefit by the defendant under circumstances where it would be unjust to do so without payment. *Lycan v. City of Cleveland*, 8th Dist. No. 94353, 2010-Ohio-6021, ¶7. Here, the plaintiff claims that the benefit conferred on the defendant is the difference between the full cash amount that the defendant required him to pay by wrongly denying coverage at the point of purchase and the scheduled amount of the benefit that the BWC ultimately paid.¹⁵ An argument that this allegation does not square with the plaintiff’s admission that “the BWC certainly may establish a maximum price”¹⁶ that it will pay for prescriptions seems to make sense, but only if one doesn’t consider that this claim is closely tied to the plaintiff’s constitutional claims. If the plaintiff’s allegations are true, then it is the defendant’s allegedly unconstitutional system of deciding and paying benefits that makes the BWC’s “retention” of the excess payment unjust.

The same context must be taken into account in the face of the defendant’s argument that the contract between the plaintiff and Rite Aid bars, as a matter of law, an unjust enrichment claim. The plaintiff’s version of events is, in essence, that the BWC forced him to enter into that contract. If true, and if the plaintiff thereby conferred a benefit on the defendant, then equity should permit him to disgorge the benefit.

For these reasons, and keeping in mind that the defendant is not asking that the claim be dismissed on summary judgment because there is no evidence to support it but on a motion to dismiss because it is legally without merit, the motion to dismiss the unjust enrichment claim is denied.

¹⁵ Br. in opp., p. 14-15.

¹⁶ *Id.*, p. 14.

Civil Rule 12(B)(6)
The equal protection constitutional claim

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Section 2, Article I of the Ohio Constitution is similar. That provision says that “[g]overnment is instituted for [the people’s] equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.”

The federal and Ohio equal protection provisions are functionally equivalent and are to be construed and analyzed identically. *Pickaway County Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908, ¶17. The equal protection clauses constrain all government actors, including the legislature in making laws and the executive branch in promulgating rules – namely, the Ohio Administrative Code. These constitutional provisions do not forbid classifications; they simply keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Id.*, ¶16.

The defendant asserts that collateral estoppel bars Rhine’s claims because the federal district court decided that R.C. 4121.44(K) does not violate the equal protection clause. But Rhine counters that he is not claiming that R.C. 4121 and 4123 violate the equal protection provisions. Instead, he believes he can prove that “the BWC’s pharmacy benefits program as implemented and administered” is unconstitutional because the bureau “distinguishes between

two groups of similarly situated workers based solely on the timing of administrative decisions.”¹⁷ The similarity is that all of the workers were granted the right to participate in the fund. The arbitrary distinction is that workers whose coverage for a particular drug was approved at the time they procured it were fully covered for the drug’s cost but that others, including Rhine, who were denied coverage at the time they got the drug but where coverage was later approved, were, in essence, forced to pay for the drug out of their own pockets.

Differing treatment by the government of people in the same class that does not place burdens upon suspect classes of people or abridge fundamental rights is constitutional under the equal protection clause if the distinctions “bear some rational relationship to a legitimate state end.” *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

It is well-known that the rational basis test is a very deferential level of scrutiny of legislative or executive action. *Pickaway County*, supra, ¶32-33. But accepting the complaint’s allegations as true, it is impossible to infer the state’s legitimate interest in arbitrarily delaying coverage decisions for some workers to put them in the untenable position of waiting for vital medication with full coverage or getting it immediately by paying for it themselves. I recognize that after a factual record is created the BWC might articulate a rational basis in the context of a motion for summary judgment – and the plaintiff might not be able to “negate every conceivable basis which might support it”¹⁸ – but the complaint does state a claim for an equal protection violation and the motion to dismiss it on the basis that it is insufficient to state a claim is denied.

¹⁷ Br. in opp., p. 16.

¹⁸ See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

Civil Rule 12(B)(6)
The due process constitutional claim

The due process clause of the Fourteenth Amendment requires that the state give a person notice and a fair hearing where it is depriving that person of a property interest. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

As with other portions of the complaint, the parties do not agree here about exactly what property interest the plaintiff claims he was deprived of without due process. The defendant's motion to dismiss characterizes the plaintiff as asserting "a property right to complete reimbursement for prescription"¹⁹ drugs. For his part, the plaintiff denies that he is claiming "that the BWC must always pay the full costs for prescription drugs"²⁰ and goes on to say that, instead:

the BWC violates [Rhine's] right to due process by imbuing the PBM's initial, non-binding denial with the effect of finality. Under the BWC's faulty system, once the PBM denies coverage at the point of service, [Rhine] automatically suffers a cost for his prescription drugs, even if he later establishes that the drug was properly prescribed to treat a condition allowed in his claim.²¹

By this description, the plaintiff is claiming to be deprived by government action of his own money, even though his complaint alleges, at paragraph 63, that his property interest is the right to prescription drug coverage, i.e. workers' compensation benefits. But either way he has alleged an interest protectible under the due process clause. He surely has an interest in his own money and The Ohio Supreme Court has held that, once a worker has established a right to receive benefits, an injured worker has a protectible interest in the continuation of the benefits. (See *State ex rel. Haylett v. Ohio Bureau of Workers' Comp.*, 87 Ohio St. 3d 325, 333 (1999):

¹⁹ Mtn. to dismiss, p. 17.

²⁰ Br. in opp., p. 19.

²¹ *Id.*, p. 19-20.

In this case, the interest affected was the continuation of workers' compensation medical benefits to which Haylett was entitled pursuant to R.C. 4123.54.)

Not only does he properly allege a protectible interest, but he also adequately alleges the lack of due process when he describes an appeal mechanism that requires him, if he wants to fill and take a prescription his doctor has told him he needs, to pay for the drug when coverage is denied even if an appeal of that denial is successful. To put it another way, there is, as a practical matter, no appeal of the denial of the benefit. Because Rhine has pled facts that, if proven, support a constitutional due process claim, the BWC's motion to dismiss the due process claim is denied.

Declaratory judgment and an injunction

The defendant argues that these claims should be dismissed because “the BWC’s practices are entirely consistent with Ohio law.”²² That misses the point. Rhine claims that the regulatory scheme implemented by the administrative agency is incompatible with the federal and state constitutions and the workers’ compensation statutes, and seeks a declaration of his rights under those laws with a concomitant request for a remedy in the form of an injunction.²³ As with the rest of his claims, the complaint is sufficient to entitle the plaintiff to the opportunity to present evidence supporting his claims, and this part of the motion to dismiss is also denied.

THE DEFENDANT’S MOTION TO TRANSFER VENUE

Civil Rule 3(B) describes the counties where lawsuits are appropriately venued. For a lawsuit against a public official acting in his capacity as such, Civil Rule 3(B)(4) provides that

²² Mtn. to dismiss, p. 18.

²³ Complaint, ¶50.

proper venue lies in the county where the public officer maintains his principal office. The defendant argues that this rule mandates the transfer of this case to Franklin County, the location of the administrator’s principal office.

But other applicable venues include a county in which the defendant conducted activity that gave rise to the claim for relief and the county in which all or part of the claim for relief arose. Civil Rule 3(B)(3) and (6). Moreover, the first nine provisions of Civil Rule 3(B) are of equal status and any one may be a proper initial place of venue without preference or priority. *Morrison v. Steiner*, 32 Ohio St.2d 86, 89 (1972).

If the plaintiff’s claims have merit, then the defendant engaged in rulemaking in Franklin County that damaged the plaintiff in Cuyahoga County. The administrator’s design and adoption of a pharmacy benefits program that “[denied] some injured workers due process and equal protection”²⁴ did not give rise to Rhine’s claim for relief. It was only when, in Cuyahoga County, Rhine made a claim and the unconstitutional rulemaking was applied to him that a claim for relief arose. Predictably, that claim “arose” where he was denied the coverage: Cuyahoga County. To use an imperfect analogy – imperfect because I do not imply that Rhine’s claim is comparable to the loss of life or limb – when a drone strike on another country is ordered from Washington, D.C. and carried out from a bunker somewhere in the United States, the effects of those actions “arise” in the target country.

Cuyahoga is also the county where the defendant’s agent – acting in accordance with the faulty process instituted by the defendant – initially denied coverage for Rhine’s drugs. The act of denying coverage occurred when it was communicated to Rhine here, thus it took place

²⁴ Br. in opp., p. 10.

here regardless of where the defendant's agent might have been physically present when the denial was decided.

The motion to transfer venue is denied because venue in Cuyahoga County is appropriate under Civil Rules 3(B)(3) and (6).

CONCLUSION

For all of the foregoing reasons the defendant's February 3, 2012, motion to dismiss is denied.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this journal entry was sent by email, this _____ day of August, 2013, to the following:

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