

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFF HOLMES,

Plaintiff-Appellant,

vs.

CRAWFORD MACHINE, INC., et al.

Defendants-Appellees.

CASE NO.: 11-2040

Court of Appeals Case No. 3-11-12

REPLY BRIEF OF DEFENDANT-APPELLEE, CRAWFORD MACHINE, INC.

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STATEMENT OF FACTS

This case arises from the Appellant Jeff Holmes' (hereinafter "Appellant") attempt to recovery attorneys' fees and costs after the primary conditions and elements of his case before the common pleas court were denied by a Jury and the only condition allowed was that of "abrasion right fifth finger" for which the only treatment was a Band-Aid.

This workers' compensation claim was initially allowed by the Bureau of Workers' Compensation (hereinafter "BWC") for conditions allegedly arising out of a claimed "electrical shock" sustained in the course and scope of Appellant's work with Crawford Machine, Inc. (hereinafter "Crawford"). Crawford appealed that decision and the District Hearing Officer of the Ohio Industrial Commission vacated the BWC's order and denied the claim. Appellant then appealed that decision to a Staff Hearing Officer and she allowed the claim for the conditions of "left shoulder strain, electrical shock, low back strain, left rotator cuff tear, left posterior shoulder dislocation and abrasion right fifth finger".

Crawford then appealed this decision to the full Industrial Commission which denied the appeal and thereafter Crawford filed an appeal into court pursuant to O.R.C. 4123.512. Appellant filed his petition and complaint and Crawford filed an Answer. Discovery proceeded with Appellant doing its depositions of lay witnesses at the last minute with Crawford extending professional courtesy by making those witnesses available.

This case went to trial on February 3, 2011 and the Jury found that Appellant did not sustain the conditions of "left shoulder strain, electrical shock, low back strain, left rotator cuff tear or left posterior shoulder dislocation". However, because there was testimony – not from Appellant's expert – that Appellant came to the first aid office with a small abrasion on his right fifth finger and was given first aid in the form of a Band-Aid, the Jury found that Appellant did

sustain a "right fifth finger abrasion" in the course and scope of his employment with Crawford. Had this condition not been attached to the other alleged conditions, this would not have risen to the level of a workers' compensation claim or even to a recordable injury.

Appellant subsequently filed a motion for payment of attorneys' fees and costs with the trial court. Crawford filed a motion contra. The trial court granted Appellant his entire request, without hearing or explanation. The trial court granted Appellant a total of \$11,751.23 for a "right fifth finger abrasion" and a Band-aid.

Crawford then appealed that decision to the Third District Court of Appeals on June 10, 2011. The Court of Appeals reversed the trial court and remanded it back for an order in compliance with the Court of Appeals decision. The Court of Appeals also certified this decision as in conflict with *Hollar v. Pleasant Township*, 10th Dist. No. 09-AP-250, 2003-Ohio-6827. Both Crawford and Appellant filed a notice of certified conflict to the Ohio Supreme Court and on March 7, 2012 the Supreme Court determined that a conflict exists and accepted jurisdiction to hear the case.

The Certified Issue for this Court's review is as follows:

[w]hen a claimant/employee petitions the common pleas court to participate in the workers' compensation fund for multiple claims/conditions and the trier of fact finds that the claimant/employee is entitled to participate in the fund for at least one of those claims/conditions, does the trial court abuse its discretion under O.R.C. 4123.512(F) by taxing an opposing party attorneys' fees and costs that are strictly related to the claims/conditions for which the trier of fact determined that the claimant/employee was ineligible to participate in the fund?

LAW AND ARGUMENT

The Decision of the Third District Court of Appeals should be affirmed pursuant to O.R.C. 4123.512(D) and (F) and the case law interpreting those code sections.

Attorneys' fees and costs:

O.R.C.4123(D) provides for the recovery of only the stenographic deposition filed in court and for copies of the stenographic deposition for each party and that cost is to be paid by the BWC out of the surplus funds. This code section, read literally, provides for no payments other than the cost of the stenographic deposition filed in court and the copies of same. Even applying O.R.C. 4123.95, requiring that workers' compensation statutes "are to be liberally construed in favor of employees", *Kilgore v. Chrysler Corp.* (2001), 92 Ohio St.3d 184, 749 N.E.2d 267; *Moore v. General Motors Corp.* (1985), 18 Ohio St.3d 259, 490 N.E.2d 1101, the Appellant is NOT entitled to recovery attorneys' fees and any other additional costs under O.R.C 4123.512(D).

Pursuant to O.R.C. 4123.512(D), stenographic and reproduction costs of depositions read at trial can be recovered by a plaintiff regardless of whether or not the plaintiff is successful in establishing his right to participate in the Workers' Compensation Fund. *Booher v. Honda of America Manufacturing, Inc.* (1996), 113 Ohio App.3d 798 at 803, 682 N.E.2d at 660 citing *Akers v. Serv-A-Portion* (1987), 31 Ohio St.3d 78, 508 N.E.2d 964.

Regardless of a plaintiff's success, the payment of this cost will come out of the State Surplus Fund. Only one form of deposition, however, either stenographic or videotape, will be reimbursed to the plaintiff pursuant to O.R.C. 4123.512(D). *State ex rel. Williams v. Colusurd* (1995), 71 Ohio St.3d 642 at 644, 646 N.E.3d 830 at 831. Expert witness fees are not taxable as costs under O.R.C. 4123.512(D). *Williams supra* at 645.

What Appellant is arguing is that, while the Court has taken a common sense approach in interpreting this statute in the past, by recognizing that times have progressed and allowing for the payment of videotape deposition, *Williams supra*, Appellant argues that no such approach should be used to interpret the statute in this instance. Appellant is asking for a liberal interpretation while requesting payment of costs for items not listed in the statute, but asking for a literal interpretation in the application with respect to when such costs are payable.

Appellant relies heavily upon O.R.C. 4123.95 requiring the liberal interpretation of statutes in favor of the claimant; however, that liberal interpretation does not require the absurd outcome of awarding \$11, 751.23 for a Band-Aid. Appellant did not expend \$11,751.23 to prove he was entitled to participate in the workers' compensation system for an abrasion to his right fifth finger. Appellant did not expend any costs in proving that. In fact, Appellant's own expert did not examine Appellant for this condition and could not and would not testify as to its existence or its causal relationship to Appellant's employment with Crawford.

Because there is no evidence of costs or attorneys' fees being expended in the proving of the abrasion of the right fifth finger, Crawford should not be charged back with any expenses related to expert deposition transcripts or videotapes paid out of the surplus fund by the BWC, pursuant to O.R.C. 4123.512(D).

O.R.C. 4123.512(F) is a broader statute pertaining to the award of fees and costs to a claimant who is successful on appeal. However, O.R.C. 4123.512(F) is not unlimited and only allows for recovery against the employer under specific instances. The Court of Appeals' decision was correct in interpreting the statute as it specifically requires that "The cost of any legal proceedings authorized by this section, including attorney's fees paid to the claimant's attorney to be fixed by the trial judge, *based upon the effort expended*" and only in the case that

the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal.

The Appellate Court in this case recognized that trial courts have discretion in awarding attorneys' fees and costs under O.R.C. 4123.512(F) and that discretion lies in the "'*extent and amount of the attorney's fees and costs awarded.*'" Citing *Dean v. Contrad* (1999), 134 Ohio App.3d 367, 372, 731 N.E.2d 212. Even Fulton, Ohio Workers' Compensation Law (2 Ed. 1998) written by the author of Appellant's *amicus* brief states that "The amount to be awarded and whether the testimony was reasonable necessary rests in the trial court's discretion". Fulton at 516, Section 12.7 citing *Moore, supra*, for the proposition that a trial court may limit the award of costs for expert witnesses to those whose testimony was reasonably necessary to the *successful prosecution* of the claimant's appeal. (Emphasis added).

There is no evidence, nor was there any presented to the trial court, of the Appellant's attorney's efforts expended in getting the condition of a right fifth finger abrasion allowed. As previously stated, this condition, by itself, would not have risen to the level of a workers' compensation claim and would have only been a first-aid only incident, without the other conditions that Appellant pursued. Further, Appellant expended all his efforts at the trial level trying to prove that Appellant sustained an electrical shock which resulted in his alleged conditions. The Jury determined he did not sustain an electrical shock in the course and scope of his employment with Crawford. (See Jury Interrogatory I).

There was no testimony at trial by Appellant or his expert (the only witnesses presented) that the Appellant injured his finger otherwise. So there was no effort or expense expended in proving this condition. The jury, apparently based upon the fact that Appellant's finger was bleeding and he needed a Band-Aid, assumed the abrasion was sustained in the course and scope

of his employment with Crawford, but not as a result of any electrical shock (Jury Interrogatory I).

The reimbursement of all other costs are governed by O.R.C. 4123.512(F) and are **contingent on a plaintiff's success in the action**. *Booher supra* at 803. Expert witness fees for preparing and giving a deposition may be taxed to the employer pursuant to O.R.C. 4123.512(F); however, whether or not this cost will be taxed to the employer “hinges on a claimant’s successful establishment of a right to participate **for the condition at issue**”. (emphasis added).

While the courts have found that the award of costs and fees is within the trial court’s discretion, the Appellate Court in this case was correct in finding that the trial court abused its discretion in awarding attorney’s fees and costs in this instance.

The Appellate Court was correct in beginning its analysis with the plain language of the statutory authority at issue. *Iams v. Daimler Chrysler Corp.*, 174 Ohio App. 3d, 2007-Ohio-6709, 883 N.E.2d 466, para. 17. “It is the court’s responsibility to enforce the literal language of a statute wherever possible; to interpret, not to legislate. Unless a statute is ambiguous, the court must give effect to its plain meaning.” *Ohio Bureau of Workers’ Compensation v. Denier*, Sixth Dist. No. L-10-1126, 2011-Ohio-150, para. 26, citing *Cablevision of the Midwest, Inc. v. Gross* (1994), 70 Ohio St.3d. 541, 544, 639 N.E. 2d 1154; R.C. 1.49.

Most importantly, the Appellate Court in this case held that “if the statute is ambiguous-meaning it is susceptible to more than one reasonable interpretation-the court may consider several factors, ‘including the object sought to be obtained, circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction.’” Citing *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40, 741 N.E.2d 121. This statute is clearly ambiguous as the courts have addressed it and expanded upon it in the past,

going beyond the literal reading. The Appellate Court also noted that “A liberal construction of the workers’ compensation laws requires courts to adopt ‘the most comprehensive meaning of the statutory terms’. Most comprehensive meaning of the statute would be to allow appointment of costs and fees.

The Court of Appeals also recognized in *Booher, supra*, that the trial court did not abuse its discretion by *denying* the claimant the costs of several physician depositions because those costs were related to the *disallowed/denied* condition of a herniated disc. What the court did in that case was to recognize the trial court’s ability and duty to distinguish between costs and fees for allowed conditions versus denied conditions and put the burden on the trial courts to exercise their discretion and intellects in a common sense and equitable manner.

The Appellate Court in the underlying decision in this case at page 36 specifically stated: “Rather, *Booher* stands for the proposition that a trial court, exercising its discretion in determining the extent and amount of costs to tax the opposing party under O.R.C. 4123.512(F) *should* consider the fact that a claimant prevailed upon some but not all of his/her claims/conditions where consideration of the same is both equitable and practicable.” By so stating, the court recognizes that, in certain cases, conditions are distinguishable as is the evidence used to support those conditions. This is certainly one of those cases.

The court also recognizes the applicability of equity and practicality. It is neither equitable nor practical to assess Crawford, on top of all its own costs in defending against the denied conditions, almost \$12,000 for a Band-Aid.

The court noted on page 36 of the underlying decision that, “While trial courts retain discretion in determining the extent and amount of attorney’s fees and costs under O.R.C. 4123.512(F), their discretion is not unlimited, but rather, is subject to review for an abuse of

discretion.” Citing *Wasinski*, 2010-Ohio-4293 at para.13; *Ruta v. Breckinridge-Remy Co.* (July 13, 2979, 6th Dist. No. E-78-49 at para.1, citing *State ex rel. Steinkamp v. Davis* (1899), 10 Ohio C.D.203, 18 Ohio C.C. 479, 1899 WL 657.

The Appellate Court also noted that, with the expansion of the types of costs that are now awardable under O. R.C. 4123.512(F), trial courts should be particularly vigilant in exercising discretion in determining the extent and amount of costs awarded. The Appellate Court cited this court’s decision in *Cave v. Conrad*, (2002), 94 Ohio St.3d, 301 762 N.E.2d 991 at 261-262 for the proposition that O.R.C. 4123.512(F) was “designed to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund.” However, Crawford submits that it was not designed to maximize expenses to the employer.

As noted earlier, in this case, the Appellant would have expended no costs or attorney’s fees in establishing that he sustained a right fifth finger abrasion as it would not have, alone, have been a compensable injury under the Ohio Workers’ Compensation system. It would have been a first aid situation necessitating no follow up treatment past the Band-Aid given him by the company. O.A.C. 4123-3-03-(A) and O.A.C. 4123-3-08(D)(1).

Because there was no medical treatment or compensation other than the Band-Aid given to the Appellant by Crawford, there would be nothing for which the Appellant could seek reimbursement from the BWC. It would be impractical for the BWC to require a claim be filed for every abrasion and Band-Aid issued by an Employer. The costs associated with processing such claims, when no payment is due to anyone, would be a waste of the BWC’s resources.

This court has also recognized in the case of *Kilgore*, 92 Ohio St.3d at 187-188 that O.R.C 4123.512(F) does not allow for the reimbursement of an attorney’s everyday costs of doing business. This court went on to state that only ”costs bearing a direct relation to a

claimant's appeal that lawyers traditionally charge to clients *and that also have a proportionally serious impact on a claimant's award.*" (emphasis added).

In the case at bar, the costs of almost \$12,000 bear no direct relationship to the Band-Aid given to the Appellant for his right fifth finger abrasion. And, while Appellant has filed for a determination of percentage of permanent partial disability for that abrasion, it is unlikely that award, if any, will bear any direct relationship to the \$12,000 in costs and fees assessed in this case. In addition, the costs to the Appellant will have no proportionally serious impact on his award because, thus far, he has only been given a Band-Aid for his one allowed condition.

In addition, the Court of Appeals in this case, at page 37 and 38, again cited the author of the Appellant's *amicus* brief in stating that the court's construction of the workers' compensation laws is "supposed to favor only deserving employees." Fulton at 10, Section 1.7, citing *Maurer*, 47 Ohio St.3d 62.

In this case, Appellant was found by a jury not to have sustained an electrical shock or any of the alleged conditions arising out of the alleged electrical shock. Crawford's position is that Appellant is not a deserving employee and that the construction of the workers' compensation laws should not be in his favor.

Appellant would have this court follow the decision in *Hollar v. Pleasant Township*, 2003 -Ohio-6827, and award all costs and fees incurred by the Appellant in this case. However, *Hollar* can be distinguished from this case. The claimant in *Hollar* was seeking allowance of conditions in the same body part. Even though the expert did not render an opinion with respect to the aggravation of degenerative disc disease, which was denied in that case, the expert's opinion at least concerned the same body part and related conditions.

In the case at bar, the expert not only did not testify to the “abrasion right fifth finger” but the expert expressly stated that he could not testify with respect to that condition because he hadn’t examined the claimant for that condition.

The case of *McGeehan v. Ohio State Bureau of Workers’ Compensation* (Dec. 28, 2000), Franklin App. No. 00AP-648 can also be distinguished. Again, the conditions sought were in the same part of the body – the back again. The expert examined that body part, even if he did not testify to the specific condition that was conceded by the employer.

Admittedly, when the expert is examining the same body part for multiple alleged conditions, separating the allowed conditions versus denied conditions with respect to fees and costs could be difficult. However, it would not be impossible. In our case, the body parts are very different and Appellant’s expert did not even examine the one body part (pinky finger) that was allowed.

Appellant argues that the applicable statutes and case law cited in his brief make it mandatory that the court award fees and costs as requested. Appellant argues that the Court of Appeals decision in this case would render “the unmistakable statutory scheme” meaningless. However, if the statutory scheme was so “unmistakable”, there would not be the number of cases there are on this issue.

Appellant argues that the General Assembly would have specified that claimant’s recovery be apportioned among conditions if that was the intent of the legislation. Using that argument, video deposition costs, travel expenses to depositions and expert fees for testimony given in court would never be permitted as they are not specified in the statute. Yet, this court has permitted those, interpreting the statutes to fit the circumstances in an equitable and reasonable manner.

This court has recognized that the legislators cannot always anticipate changing times and circumstances in which the legislation will be applied. Therefore, this court has allowed for the recovery of costs not specifically spelled out in the statutes. By the same token, the Court should allow the trial courts to use their discretion to apportion fees. If that was not the legislative intent, they would have not given courts the right to determine the extent and reasonableness of costs and fees.

Appellant argues that by applying the Court of Appeals rationale in this case creates a “subjective system that would allow trial courts to put a value on each condition.” That is incorrect. What it does is create a system in which the trial court uses its discretion to allocate costs and fees expended for each condition. It would be incumbent upon the claimant’s counsel to present evidence upon which the court could rely. What is subjective is the trial court’s award of all requested fees and costs with no evidence presented upon which it could rely.

Appellant’s arguments infer that the trial courts are not capable of differentiating and distinguishing what fees and costs are attributable to each alleged condition. Using Appellant’s argument and logic, the court would never be permitted to reasonably and equitably allocate fees and costs. However, using the Court of Appeals’ logic, the trial court would be permitted to reasonably and equitably allocate costs and fees or, if it was impossible to determine what costs and fees were necessary for each condition, the court could determine that and give its rationale.

That is the essence of judicial discretion.

Crawford also argues that the General Assembly did not intend for a small employer to be assessed almost \$12,000 for a condition that required no more than a Band-Aid.

Dr. Zuesi's Expert Witness Fee and Video Deposition:

The trial court was not permitted to award both the cost of Dr. Zuesi's deposition transcript and deposition video under O.R.C. 4123.512 (D) or (F). *George v. Ohio Bur. of Workers' Comp.* (1997), 120 Ohio App.3d 106, 107, 696 N.E.2d 1101. At oral argument, Crawford conceded that the trial court could tax one or the other of the videotape deposition or the stenographic transcript, but not both.

However, the Court of Appeals was correct in finding that the trial court's award of Dr. Zuesi's expert witness fee was not taxable under O.R.C. 4123.512(D). The court noted that, pursuant to the testimony given at trial, Dr. Zuesi did not examine the right fifth finger and therefore he *only* examined on the conditions that were denied by the jury. While the Court of Appeals recognizes the trial court's ability to use its discretion in determining what fees and costs can be assessed, it also found that the trial court's decision to tax Crawford with Dr. Zuesi's expert witness fee of \$1,600, was unreasonably in light of the minimal injury and the fact that Dr. Zuesi did not examine the Appellant or testify as to causal relationship of that minimal condition to Appellant's work.

Lay Witness' Depositions:

O.R.C. 4123.512(D) only allowed for the costs of filed physician depositions and not the depositions of lay witnesses. *McGuire v. Mayfield* (Dec. 9, 1991), 3d Dist. Nos. 1-90-83,1-90-88 at para. 3; *Evans V. TNT Holland Motor Express* (July 10,1997), 8th Dist. Nos. 71391, 71516 at para. 7; *Talmon v. Quick Air Freight, Inc.* (Oct. 5, 1995), 8th Dist. No. 6887 at para 2. The Appellate Court was correct in finding that the award of costs associated with lay witness depositions was an abuse of discretion by the trial court. Crawford urges this court to find that

the costs of taking lay witness depositions, are not provided for under either O.R.C. 4123.512(D) or (F) and therefore are not payable.

Filing Fees, Fed-Ex Postage, and Exhibit Boards:

The Appellate Court was also correct in holding that the costs associated with filing fees, Fed-Ex postage and trial exhibit boards are not payable pursuant to O.R.C. 4123.512(D). Crawford urges this court to find that these same expenses and costs are not payable under O.R.C. 4123.512(F). These costs are simply the cost of doing business.

Travel Costs and Hotel Expenses:

The Appellate Court was correct in finding that the trial court erred and abused its discretion in ordering the award of Appellant's attorney's travel costs to and from trial and lodging costs for trial because those costs were "everyday costs of doing business" and not directly related to the Appellant's claim.

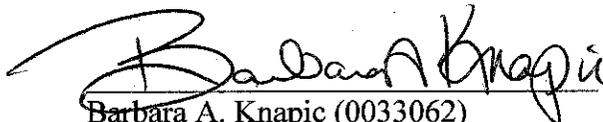
The Appellate Court also found there was no abuse of discretion in awarding travel costs to and from lay witnesses' depositions *so long as those depositions were not strictly related to Holmes' unsuccessful claims/conditions*" at page 42. Crawford argues that none of the lay witnesses' depositions were necessary to prove the existence of an "abrasion right fifth finger". It was a first aid only condition for which Appellant's testimony would have been sufficient to establish.

Crawford argues that the filing fees, Fed-Ex postage and exhibit boards, travel costs and hotel expenses are all costs of doing business. Some of these costs, particularly the Fed-Ex postage costs, were incurred by Appellant's failure to complete discovery and take depositions until just before trial.

CONCLUSION

For the reasons set forth herein, Crawford urges this court to affirm the decision of the Court of Appeals as it complies with both O.R.C 4123.512(D) and (F) and the case law interpreting those code sections. The Court of Appeals decision is logical and provides for the application of equity and reasonableness to be applied by trial courts when using their discretion in awarding fees and costs. The Court of Appeals decision most accurately reflects the legislative intent as it applies to this case.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the **REPLY BRIEF** was sent by regular U.S. mail to Counsel for Plaintiff-Appellant, Jeff Holmes and a copy by regular U.S. mail and to the Assistant Attorney General, Kevin Reis this 3rd day of July, 2012:

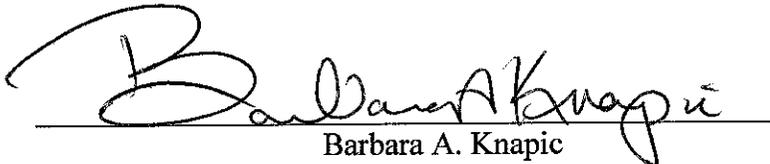
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APPENDIX

Jury Interrogatory I A

FILED IN CASE NO. 10-CV-0221
2011 FEB -3 PM 3:21
SUE SEEVERS
CRAWFORD COUNTY

IN THE COMMON PLEAS COURT,
CRAWFORD COUNTY, OHIO

JEFF HOLMES, :
Plaintiff, : CASE NO. 10-CV-0221
vs.
CRAWFORD MACHINE INC., et al., : INTERROGATORIES I
Defendants. :

1. Did the Plaintiff, Jeff Holmes, sustain the condition of "electrical shock" as a direct and proximate result of his employment with Crawford Machine, Inc.?
Yes _____ No X

At least six jurors must agree on the resolution of this issue.

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|-----------------------------|-----------------------------|
| 1. <u>Sandra Gessel</u> | 5. <u>Adeline K. K... J</u> |
| 2. <u>Brian Frank</u> | 6. <u>James H. Decker</u> |
| 3. <u>James H. Thompson</u> | 7. <u>Mary Ann Miller</u> |
| 4. <u>Monica J...</u> | 8. _____ |