

In the
Supreme Court of Ohio

JEFF HOLMES,	:	Case No. 2011-2040
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Crawford County Court of Appeals,
v.	:	Third Appellate District
	:	
CRAWFORD MACHINE, INC, et al.,	:	Court of Appeals
	:	Case No. 3-11-12
Defendants-Appellees.	:	

**MERIT BRIEF OF APPELLEE ADMINISTRATOR,
BUREAU OF WORKERS' COMPENSATION**

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INTRODUCTION

Ohio's workers' compensation law rests on the fundamental principle that a claimant's right to participate is always a right to participate "for a *specific* injury." *Ward v. Kroger Co.*, 106 Ohio St. 3d 35, 2005-Ohio-360, ¶ 10 (emphasis added). Accordingly, when a party appeals an Industrial Commission determination of a right to participate under R.C. 4123.512, the common pleas court must separately decide the claimant's right to participate for each injury alleged. If a claimant establishes a right to participate—for even a single injury—during that proceeding (".512 proceeding"), he or she may recover attorney fees and costs that were connected with and reasonably necessary to the successful appeal of that injury.

This certified-conflict case asks whether fees and costs can be recovered in a .512 proceeding if they relate strictly to the claimant's *unsuccessful* claims. They cannot. Claimants who establish a right to participate during a .512 proceeding, but not for every injury alleged, are not entitled to recover attorney fees and costs that relate solely to their unsuccessful claims.

The General Assembly authorized the recovery of certain costs and fees to ensure that a claimant's compensation for an injury is not unfairly reduced by the expense of proving the right to participate for that injury in a .512 proceeding. But the General Assembly never intended to reimburse the costs and fees for a claimant's unsuccessful efforts to establish a right to participate for additional injuries. In short, the defendant who successfully defends against an injury does not pay for the losing claimant's costs, nor does it pay related attorney fees. Accordingly, a claimant cannot invoke .512(F) to recover costs and fees that are strictly related to an injury on which a claimant did not prevail at trial, and a trial court abuses its discretion by awarding those expenses.

The facts of this case illustrate the absurdity of a contrary rule. Here, Appellant Jeff Holmes alleged a right to participate for six injuries. After a three-day trial, a jury determined

that Holmes had a right to participate for only one—“abrasion right fifth finger”—but agreed with Holmes’s employer, Crawford Machine, Inc., that he was not entitled to participate for the other five. The trial court then awarded Holmes the full amount of attorney fees and costs he requested under .512(F)—more than \$11,000. But almost all these expenses related to Holmes’s unsuccessful efforts on the other five injuries. The trial court never considered which, if any, of these costs and fees were connected with and reasonably necessary to proving Holmes’s right to participate for the scratch on his finger.

The certified question asks whether a common pleas court abuses its discretion under R.C. 4123.512(F) by taxing an opposing party attorney fees and costs that are strictly related to unsuccessful claims. The Court should answer “yes,” and should remand for the trial court to determine which of Holmes’s costs and fees are strictly related to injuries for which Holmes did not establish a right to participate.

STATEMENT OF THE CASE AND FACTS

A. The Industrial Commission found that Holmes had a right to participate in the workers’ compensation fund for six injuries.

In July 2009, Jeff Holmes filed a workers’ compensation claim alleging that he was electrically shocked while working on a screw machine (a type of lathe) for his employer Crawford Machine, Inc. *Holmes v. Crawford Mach., Inc.*, 2011-Ohio-5741, ¶ 3 (3d Dist.) (“App. Op.”). According to Holmes, he sustained six separate injuries as a result of the alleged shock.

After several administrative hearings, the Commission determined that Holmes had a right to participate in the workers’ compensation fund for all six injuries. *Id.* ¶ 4.

B. The employer appealed to the common pleas court, and a jury found that Holmes had a right to participate in the fund for just one injury—an abrasion on his right fifth finger—but did not have a right to participate for five other alleged injuries.

Crawford Machine, the employer, appealed the Commission's determination under R.C. 4123.512, triggering a de novo trial in the common pleas court. *Id.* ¶ 6. Holmes continued to assert a right to participate for all six injuries. *Id.* ¶ 7.

The court held a three-day jury trial, which focused on whether Holmes's alleged injuries were caused by an electrical shock from Crawford's machine. *Id.* ¶ 8. Holmes testified and also offered testimony from five Crawford employees and one medical expert, Dr. Thomas Zuesi.

Dr. Zuesi testified about five of Holmes's six alleged injuries. Relying on Holmes's "state[ment] that he had been exposed to an electrical current at work," Dr. Zuesi opined that the exposure caused Holmes to suffer a left shoulder sprain, electrical shock, low back sprain, left rotator cuff tear, and left posterior shoulder dislocation. *See* Supp. 71, 72, Video Dep. of Dr. Zuesi ("Zuesi Dep.") 38, 39 (Jan. 14, 2011); Supp. 84, Trial Trans. Vol. I, at 223 (Feb. 1, 2011) (playing the video deposition). Although Dr. Zuesi defined the term "abrasion" and explained that abrasions "usually heal[] with a scab and no sutures," Supp. 47, 48, Zuesi Dep. at 14-15, he explicitly refused to "say anything about" the alleged "abrasion of [Holmes's] right fifth finger," because Dr. Zuesi had not examined the finger and therefore did not "put that [injury] in his diagnosis." Supp. 65, 70, *id.* at 32, 37.

Although Dr. Zuesi did not testify about the abrasion, other evidence "demonstrated that Holmes' pinky finger had a 'small skinned spot on the knuckle,' which was treated with a bandage." App. Op. ¶ 71 (*quoting* Supp. 76, 79-82, Trial Trans. Vol. I, at 150, 195-98 (Feb. 1, 2011)).

In defense, Crawford Machine presented several witnesses. An electrician and an electrical engineer opined that Holmes could not have been shocked by the screw machine. Then two

doctors expressed doubt about Holmes's claimed injuries absent evidence of the electrical shock. *See* Supp. 85-245, Trial Trans. Vol. II, at 305-435 (Feb. 2, 2011) & Trial Trans. Vol. III, at 445-74 (Feb. 3, 2011).

The jury returned six separate verdicts, one for each of the claimed injuries. The jury found that Holmes did not suffer an electrical shock as a result of his employment with Crawford Machine, Supp. 1 (Interrogatories I), and that he had no right to participate in the fund for five claimed injuries: (1) electrical shock, (2) left shoulder strain, (3) left rotator cuff tear, (4) low back strain, and (5) left posterior shoulder dislocation. Supp. 1-10 (Interrogatories and Verdict I-V). The jury did, however, find that Holmes had a right to participate for "abrasion right fifth finger." Supp. 11-14 (Interrogatories and Verdict VI; Judgment Entry).

In short, the jury found that Holmes suffered a single injury as a direct and proximate result of his employment: He scratched his right pinky finger. Nothing more.

C. Holmes moved for \$11,751.23 in costs and attorney fees and the trial court, without explanation, awarded the entire amount.

Holmes moved for attorney fees and costs under R.C. 4123.512(D) & (F) and submitted a five-page brief in support. Holmes requested \$7,551.23 for costs; he also requested \$4,200 in attorney fees—the maximum amount allowed under R.C. 4123.512(F)—"[b]ecause of the amount of time Plaintiff's Counsel had to spend on the court case." Supp. 15-40 (Plaintiff's Mot. for Attorney Fees (Apr. 5, 2011)). Holmes did not identify which of the requested costs and fees pertained to his one successful claim—"abrasion right fifth finger."

The trial court, without holding a hearing or requesting additional information, issued a one-paragraph order awarding Holmes "costs and attorney fees . . . in the amount of \$11,751.23." Supp. 41, Trial Ct. Order (June 27, 2011).

Crawford Machine sought reconsideration, arguing that the award was excessive and asking for a hearing to determine “those costs and attorneys’ fees expended specifically for the condition that was allowed by the jury.” Supp. 42-45, Def.’s Mot. for Reconsideration (May 25, 2011). The trial court denied the motion, but stayed its order pending the employer’s appeal.

D. The appeals court reversed and remanded, admonishing the trial court not to tax fees and costs that strictly related to Holmes’s “unsuccessful claims/conditions.”

The Third District reversed the trial court’s order and remanded for further consideration. App. Op. ¶ 83. The appeals court held that .512(F) limits recovery to costs and fees related to a successful claim.

First, the court reversed the attorney fee award and remanded for a hearing to determine reasonable fees based on the effort expended by Holmes’s trial counsel. *Id.* ¶ 80. In doing so, the appeals court expressly admonished the trial court “not [to] tax attorney’s fees that are *strictly related* to Holmes’ unsuccessful claims/conditions, . . . as that would be unreasonable in this case.” *Id.*

Then, the court considered costs. The Third District affirmed the reimbursement of costs for Dr. Zuesi’s video deposition (because Crawford Machine conceded them on appeal) and for the stenographer at the deposition (under R.C. 4123.512(D)). *Id.* ¶¶ 69, 72. The 4123.512(D) stenographer costs are not at issue here. Only the costs awarded under 4123.512(F)—potentially available if a claimant prevails in the common pleas court—are part of the certified question. *See also Akers v. Serv-A-Portion, Inc.*, 31 Ohio St. 3d 78, 80 (1987) (confirming that even unsuccessful plaintiffs can recover 4123.512(D) stenographer costs).

As to 4123.512(F) costs, the appellate court reversed the award for Dr. Zuesi’s expert witness fee, *id.* ¶¶ 70-71, and directed the trial court to reconsider the reasonableness of charging Crawford Machine with the cost of lay witness depositions, *id.* ¶ 73, as well as filing fees, Fed-

Ex postage, and exhibit boards, *id.* ¶ 74. The court also reversed the award for the travel costs associated with Dr. Zuesi's deposition and the trial. *Id.* ¶ 76. But the court upheld travel costs related to "the depositions of the lay witnesses . . . so long as those depositions were not strictly related to Holmes' unsuccessful claims/conditions." *Id.*

E. The appeals court identified a conflict with *Hollar v. Pleasant Twp.*, 2003-Ohio-6827 (10th Dist.), and this Court accepted the certified conflict question.

The Third District found that its decision denying costs and fees for unsuccessful claimed injuries conflicted with *Hollar v. Pleasant Twp.*, 10th Dist. 03AP-250, 2003-Ohio-6827, and certified a question to this Court. The Court accepted the question, and ordered the parties to brief the following issue:

When 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 but not all of the claims/conditions, does the trial court abuse its discretion under R.C. 4123.512(F) by taxing an opposing party attorney's 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?"

03/07/2012 Case Announcements, 2012-Ohio-896. The Court denied Holmes's separate requests for discretionary review in Case Nos. 2011-2149, and 2011-2150. *Id.*

ARGUMENT

Administrator's Proposition of Law:

A trial court abuses its discretion under R.C. 4123.512(F) when it awards attorney fees and costs that are strictly related to an unsuccessful request to participate in the workers' compensation fund for a particular injury.

Under R.C. 4123.512(F), a trial court may award only those attorney fees and costs connected to and reasonably necessary for a successful claim at a .512 proceeding. The Court should therefore answer the certified question "yes," and hold that a trial court abuses its discretion when it awards attorney fees and costs that are strictly related to an unsuccessful claim.

A. Costs and fees awarded under R.C. 4123.512(F) must be connected to success in the trial court.

Three general principles govern .512(F) awards. First, the purpose of cost and fee awards under .512 is to reimburse claimants for securing the right to participate for a particular injury. Second, costs and fees related to unsuccessful requests to participate, if divisible from costs and fees related to successful requests to participate, are not recoverable. And third, any costs or fees awarded under the statute must be reasonably necessary to the success in the .512 proceeding.

1. A claimant may recover attorney fees and costs if a .512 proceeding results in a determination that the claimant has a right to participate, or to continue to participate, in the workers' compensation fund.

Successful claimants may recover certain attorney fees and costs incurred to prepare for and present their claimed injuries in the trial court. Under R.C. 4123.512, these claimants may recover as follows:

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, [shall be taxed against the employer or the commission] The attorney's fee shall not exceed forty-two hundred dollars.

R.C. 4123.512(F). If a trial court finds that a claimant has a right to participate, the claimant is eligible for the appropriate award under this provision.

The General Assembly enacted .512(F) "to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund." *Moore v. Gen. Motors Corp.*, 18 Ohio St. 3d 259, 262 (1985); *see also Schuller v. U.S. Steel Corp.*, 103 Ohio St. 157, 2004-Ohio-4753, ¶ 7; *Kilgore v. Chrysler Corp.*, 92 Ohio St. 3d 184, 187 (2001). Claimants incur "significantly greater" expense if they have to prove their right to participate (or to continue to participate) for a particular injury in a .512 proceeding than they otherwise would in administrative proceedings. *Moore*, 18 Ohio St. 3d at 261. Accordingly, the General

Assembly decided to reimburse successful claimants for certain costs and fees to ensure that their workers' compensation benefits are not unfairly reduced by those additional expenses. *Kilgore*, 92 Ohio St. 3d at 187.

The Court should heed that legislative purpose. The sole goal in allowing claimants to recover certain costs under .512(F) is to ensure that benefit awards are not unreasonably reduced by the additional expense of a .512 proceeding. *See Kilgore*, 92 Ohio St. 3d at 187. The purpose, however, is *not* to penalize the party who contested the claimant's right to participate or to provide a windfall to sympathetic claimants. *See Lybarger v. Burma Farms, Inc.*, 1993 Ohio App. Lexis 1090, at *3 (6th Dist. 1993) ("The award of attorney fees is for the purpose of making the claimant whole, not for the purpose of punishing the unsuccessful appellant.").

2. Like other costs and fees awarded under Ohio law, .512(F) awards must be divided to exclude costs or fees connected to non-reimbursable claims.

Revised Code 4123.512(F), tracks a general principle of Ohio law: When "claims can be separated into a claim for which fees are recoverable and a claim for which no fees are recoverable, the trial court must award fees only for the amount of time spent pursuing the claim for which fees may be awarded." *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St. 3d 143, 145 (1991) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Using the language of workers' compensation, R.C. 4123.512(F) only authorizes awards for those injuries successfully "established" at the trial court. If attorney fees or costs are strictly related to *unsuccessful* claimed injuries in the trial court, those are claims "for which no fees are recoverable." *Id.*

Ohio courts follow *Bittner's* division principle in various contexts. The Eighth District recently applied *Bittner* and affirmed an award that apportioned fees according to successful and unsuccessful claims. *Demming v. Smith*, No. 94106, 2010-Ohio-4134, ¶¶ 51-52 (8th Dist.) And the Sixth District cited *Bittner* when it reversed an award that included fees "clearly related" to a

claim dismissed on summary judgment. *Norfolk S. Ry. v. Toledo Edison Co.*, No. L-06-1268, 2008-Ohio-1572, ¶ 72 (6th Dist.).

Bittner and cases applying it stand for a common-sense principle: Awards are not justified for fees and costs distinctly connected to non-compensable claims. Revised Code 4123.512(F) designates as compensable only expenses connected with the specific claimed injuries that an employee successfully prosecutes at a .512 trial in common pleas court. Here, the appellate court correctly reversed and remanded because the trial court awarded costs and fees connected *only* to unsuccessful claimed injuries.

3. Costs and fees awarded under R.C. 4123.512(F) are also limited by the principle that they must be “reasonably necess[ary] to the presentation of the claimant’s appeal.” *Schuller v. U.S. Steel Corp.*, 103 Ohio 157, 2004-Ohio-4753, ¶ 8.

To be sure, sorting out costs and fees connected with successful versus unsuccessful claimed injuries is sometimes difficult. But *Bittner* requires only that a trial court divide awards when the contrast between the awardable and non-awardable costs and fees is “distinct.” 58 Ohio St. 3d 143, 145. *Bittner*’s command is sensible and is further refined by this Court’s established 4123.512(F) jurisprudence evaluating whether a litigation cost is a “*reasonable necessity*” to the successful .512 proceeding.

Specifically, the Court has explained that every cost and fee awarded is contingent on “the trial court’s determination of [its] *reasonable necessity* to the presentation of the claimant’s appeal.” *Schuller*, 2004-Ohio-4753, ¶ 8 (emphasis added); *see also Kilgore*, 92 Ohio St. 3d at 188 (recovery of travel costs was “subject to the trial court’s determination of their reasonable necessity to the presentation of the claimant’s appeal”); *Moore*, 18 Ohio St. 3d at 262 (trial court had “discretion to limit the award of costs for expert witnesses to those experts who are reasonably necessary to the presentation of the claimant’s . . . appeal”).

A trial court may only conclude that a cost is “reasonably necessary” if it is “directly related to the claimant’s appeal.” *Schuller*, 2004-Ohio-4753, ¶ 13; *see also Johnson-Floyd v. Rem Ohio, Inc.*, No. 110CA-25, 2011-Ohio-6542, ¶ 15 (5th Dist.) (affirming fee award 20 percent below the statutory maximum because counsel’s delay in responding to discovery and futile effort to oppose independent medical exam were charges “necessitated by” counsel’s actions that did nothing to advance her client’s success at trial).

B. A fee or cost is not reimbursable under R.C. 4123.512(F) if it is strictly related to an unsuccessful claimed injury in the trial court.

Together, *Bittner* and *Schuller* mean that a claimant can recover costs and fees under .512(F) if those expenses are connected to a successful request to participate and those expenses were reasonably necessary to that success. On the other hand, a cost or fee is non-compensable under the statute if it is strictly related to an unsuccessful request to participate. In turn, under Ohio’s workers’ compensation system, success—a “right to participate” in the fund—is always linked to a *specific injury*. Accordingly, to evaluate whether a cost or fee in a .512 proceeding is compensable, a trial court must determine whether the expense is connected to successfully proving a right to participate for a specific injury. If a cost or fee is strictly related to an unsuccessful request for a specific injury, it is not compensable.

1. A claimant’s right to participate is never abstract or generic; the right to participate is always tethered to a specific injury.

There is no such thing as a “generic” right to participate in the workers’ compensation fund. *Ward*, 2005-Ohio-360, ¶ 10. Instead, “the right to participate” is always “a right to participate in the fund for a specific injury.” *Id.*; *see also Zavatsky v. Stringer*, 56 Ohio St. 2d 386, 391-92 (1978) (a right to participate relates to “specific parts of the body” and describes “specific physical conditions”).

Likewise, a .512 proceeding is always tethered to a specific injury because there is no such thing as a workers' compensation claim for "an injury." *Ward*, 2005-Ohio-360, ¶ 10. Conversely, a determination adverse to a claimant is limited to a specific injury and the claimant can still pursue a right to participate for other injuries. *Id.*

The entire workers' compensation system rests on this foundational "right to participate." Accordingly, each injury "that is alleged to give the claimant a right to participate in the Workers' Compensation Fund must be considered as a *separate claim* . . . and each such claim must proceed through the administrative process." *Id.* ¶ 11 (emphasis added). *See also Felty v. AT&T Tech., Inc.*, 65 Ohio St. 3d 234, 239 (1992) ("A 'claim' in a workers' compensation case is the basic or underlying request by an employee to participate in the compensation system because of a specific work-related injury or disease."). Then the Commission must decide the right to participate with respect to each particular injury. *See Ward*, 2005-Ohio-3560, ¶ 11; *see also* R.C. 4121.36(B)(4) (every Commission order must describe the "part of the body and the nature of the disability" involved in the claim).

The same is true in a .512 appeal. The appealing party must identify the specific injuries being appealed. Either a claimant or employer can appeal a particular administrative decision even if the same order "also grants or denies a right to participate for other injuries." *Zavatsky*, 56 Ohio St. 2d 386, 404. As in administrative proceedings, a claimant must prove her right to participate for each injury alleged, and the trial court must decide the right to participate for each separately. If the court finds a right to participate for only some of the injuries alleged, then the Commission's subsequent jurisdiction is limited to determining benefits for those specific injuries. *See* R.C. 4123.512(G).

All this confirms the Court’s statement that the right to participate is a “right to participate . . . *for a specific injury.*” *Ward*, 2005-Ohio-360, ¶ 10; *see also Starkey v. Builders Firstsource Ohio Valley, L.L.C.*, 130 Ohio St. 3d 114, 2011-Ohio-3278, ¶ 17 (“The ultimate issue in a workers’ compensation appeal [under R.C. 4123.512] is the claimant’s right to participate in the fund for an injury received in the course of, and arising out of, the claimant’s employment.”).

That a right to participate means only a right tethered to a specific injury shows that Holmes and his Amici misunderstand the significance of a trial court finding “a right to participate” during a .512 proceeding. They broadly imply that a claimant is victorious when the trial court finds *some* “right to participate,” instead of recognizing that the inquiry proceeds injury by injury—that the “right to participate” is always limited to the specific injuries identified by the court. Thus, it *does* matter “how many” injuries the claimant can prove” in a .512 hearing and it *does* “make[. . . sense to limit attorney’s fees or costs based upon only those” injuries proven. *Id.* at 8-9.

2. Because the right to participate is always tethered to a specific injury, a claimant may not recover costs and fees strictly related to an unsuccessful cause of action for that injury.

The tie between a claimant’s right to participate and a particular injury frames .512(F)’s cost-shifting provision. When the General Assembly directed courts to award costs and fees to a claimant who establishes a right to participate—for a specific injury—it intended those expenses to be likewise tethered to the injury on which the claimant prevailed at trial.

Because a claimant can only ever establish a right to participate *for a particular injury*, a cost or fee can only be reimbursed if it is related to and reasonably necessary for success on that injury. *See Bittner*, 58 Ohio St. 3d 143, 145; *Schuller*, 2004-Ohio-4753, ¶ 8. Accordingly, a cost or fee strictly related to an unsuccessful request to participate for a particular injury is not

compensable. Put another way, defendants do not pay costs or fees strictly related to requests to participate they have defeated.

For years, Ohio's appeals courts have been applying this standard to review awards issued under .512(F) and its predecessor, R.C. 4123.519. Because an employer should not be taxed for a fee or cost associated solely with an unsuccessful claim, a trial court may deny reimbursement for costs "related to" an "unsuccessful . . . claim." *Booher v. Honda of Am. Mfg.*, 113 Ohio App. 3d 798, 804 (3d Dist. 1996). For example, in *Booher*, the claimant asserted a right to participate for two injuries: a sprain and a herniated disc. During a .512 proceeding, the jury found that the claimant had a right to participate for the sprain, but not for the herniation. The claimant moved for costs and fees, citing his right to participate for the sprain. The trial court refused to reimburse the deposition costs and expert fees for three physicians who testified *only* about the herniation—a separate expert had testified only about the sprain—and the Third District affirmed. *Id.* at 804.

Conversely, when an expert testifies in support of several injuries, some of which are accepted and some of which are rejected by the trier of fact, a court may abuse its discretion by refusing to award the entire expert fee. *See, e.g., Azbell v. The Newark Group Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639, ¶ 41. In *Azbell*, the Fifth District found error when the trial court declined to award a fee for an expert who testified in support of a claimant's right to participate for four different injuries, observing that the expert's testimony all "stemmed from one course of interrelated, ongoing medical treatment." *Id.* The claimant prevailed on only one injury, but the expert's fee was not "easily apportioned based on the claimant's success." *Id.* Reasoning that "[i]t would be difficult, if not impossible for the trial court to determine what percentage of the doctor's testimony was relevant to a particular injury" and that it would be

“equally difficult to then determine a percentage of apportionment for medical expert fees and costs,” the appeals court held that the claimant was entitled to the requested amount. *Id.* ¶ 42.

Here, the Third District applied the same rationale, articulating the rule in terms of equity and practicability: “A trial court, exercising its discretion in determining the extent and amount of costs to tax the opposing party under R.C. 4123.512(F), *should* consider the fact that a claimant prevailed on some but not all of his/her claims/conditions where consideration of the same is both equitable and practicable.” App. Op. ¶ 65.

3. A trial court abuses its discretion by awarding costs and fees that are strictly related to unsuccessful claimed injuries.

A trial court should only award costs or fees that are connected to injuries for which a claimant establishes a right to participate. Accordingly, a court abuses its discretion by awarding costs or fees that are strictly related to an injury on which the claimant did not prevail. The Court should therefore answer the certified question, “yes.”

Here, the trial court failed to analyze the specific costs and fees requested by Holmes, and failed to decide whether these expenses related to Holmes’s right to participate for a finger abrasion. These failures are significant because every cost or fee related to Holmes’s medical expert was unrelated to his finger-abrasion injury. *See* Supp. 65, 70, Zuesi Dep. at 32, 37 (testifying that he did not examine the finger and therefore did not “put that [injury] in his diagnosis”); *see also White Motor Corp. v. Moore*, 48 Ohio St. 2d 156, 160 (1976) (“[W]here the question of injury . . . [is] a matter of common knowledge to the average layman, it is not necessary to submit medical testimony in order to get the case to the jury.”); *see also* Supp. 13 (Verdict VI) (finding a right to participate for the abrasion even though Holmes’s medical expert had not testified to it). Accordingly, after clarifying the standard for .512(F) awards, the Court should remand for the trial court to determine which costs and fees were strictly related to

Holmes's unsuccessful requests to participate for five injuries *other than* "right fifth finger abrasion."

To be clear, however, answering the certified question "yes" does not require the Court to endorse a magic formula for apportioning costs and fees when a claimant is only partially successful. As discussed above, it will be unclear in many cases whether a cost or fee pertains solely to an injury on which the claimant did not succeed. But as long as a cost or fee is reasonably related to the claimant's success in establishing a right to participate for a particular injury, a trial court enjoys latitude when deciding whether an expense is strictly related to an unsuccessful claimed injury. *See Bittner*, 58 Ohio St. 3d 143, 145 (approving apportionment where "claims can be separated").

C. Holmes advocates a rule that is unsupported, ill-advised, and unprecedented.

1. Holmes's proposed rule is both unsupported and ill-advised.

Disregarding all of the above, Holmes now asks this Court to transform .512(F) from a modest provision that protects a claimant's benefits award from the legitimate costs of litigating into an aggressive tool for penalizing the state fund and employers, and providing windfalls to employees. Under Holmes's proposed rule, a claimant who establishes a right to participate for a single (even minor) injury in a .512 proceeding would automatically recover all costs and attorney fees. Holmes can marshal only weak support for this proposal, in large part because his rule defies the General Assembly's intent and would undermine the fundamental principle of Ohio's workers' compensation law that requires benefits to be causally related to the injury. Here, the jury rejected all five of Holmes's significant claimed injuries, and most of the costs and fees he was awarded have no relation to his single successful claimed injury for a finger abrasion.

First, Holmes argues that the plain text of .512(F) authorizes “winning” claimants to recover all reasonable costs and fees related to the appeal, even when the expenses pertain only to unsuccessful requests to participate. Holmes Br. at 8. It is true that the statute does not require a claimant to prevail on every injury as a precondition for recovery under .512(F). But the statute does condition awards on “establishing” the claimant’s right to participate and that right to participate is always tethered to a *specific injury*. Despite what Holmes maintains, .512(F)’s failure to mention “apportionment” is not “conclusive evidence” that the General Assembly intended claimants to be compensated for costs and fees strictly associated with unsuccessful requests to participate. See Holmes Br. at 11, 15.

Holmes’s Amici do not rescue the textual argument by pointing to the liberal construction canon in R.C. 4123.95. While that statute directs courts to interpret the workers’ compensation statutes “liberally,” it does not—as Amici suggest—“mandate” an interpretation of 4123.512(F) “in favor of the claimant” in every case. Claimants Br. at 11. “The liberal construction provision of R.C. 4123.95 does not necessarily equate with giving an individual claimant what he thinks is best in his particular situation.” *Swallow v. Industrial Com.*, 36 Ohio St. 3d 55, 57 (1988). Besides, this Court has recognized that the presumption favoring claimants for reimbursement of costs applies only for expenses “connected with the preparation and presentation of a *successful* appeal.” *Schuller*, 2004-Ohio-4753, ¶ 7 (emphasis added). Here, Holmes was awarded litigation costs and fees for injuries on which he did not prevail.

Second, Holmes overstates the ameliorative purpose of .512(F) awards in an attempt to bolster his position. True, as already acknowledged, the General Assembly adopted this provision to ensure that a claimant’s benefits are not unfairly diminished by reasonable litigation expenses incurred during a .512 proceeding. *Moore*, 18 Ohio St. 3d at 262. But the point is to

ensure that a claimant's benefits for an injury are not unfairly reduced by the costs incurred to succeed on *that* injury in a .512 proceeding. The point is not to protect a claimant's benefits from costs and fees strictly related to other injuries that the factfinder disallowed. There is no logical reason to think the General Assembly intended otherwise.

Third, Holmes's contention that the Administrator's standard is overly subjective and unworkable falls flat. *See* Holmes Br. at 11; Claimants Br. at 13. Holmes's Amici say trial courts cannot feasibly apportion costs and fees to exclude those associated solely with unsuccessful requests to participate for a particular injury. Claimants Br. at 13. But the Administrator is not advocating any formula for apportionment, or even insisting that, in every case, costs and fees will be capable of apportionment. The Administrator argues only that a court must always analyze whether costs and fees can be divided and that a court cannot award costs or fees *strictly related to* an unsuccessful request to participate for a particular injury under .512(F). This is precisely the sort of inquiry trial courts already undertake when making .512(F) awards: They decide whether each requested cost or fee is reasonably necessary to a claimant's appeal and, if so, is a reasonable amount. *Schuller*, 2004-Ohio-4753, ¶ 13. Answering the certified question "yes" will clarify that inquiry, not complicate it.

Fourth, the Administrator is not—as Amici suggest—asking courts to “reduc[e] costs based on the severity of a particular injury.” Claimants Br. at 15. The nature of an injury is relevant to a .512(F) inquiry only insofar as it implicates the reasonableness of costs or fees incurred to prove that injury. For example, if a claimant could easily prove an injury with lay witness testimony alone, the expense of having four medical experts testify about the injury would likely not be reasonable.

Finally, Holmes's Amici argue that the Administrator's rule is bad policy because it would deter claimants from appealing and punish them for injuries not proven at trial. *See* Claimants Br. at 12. Like all plaintiffs, claimants have to weigh the costs of litigating against the potential benefits of a victory. Requiring claimants to bear the costs of their own unsuccessful litigation efforts is not a penalty, it is a reality of litigation. By contrast, Holmes's proposed rule *would* impose a penalty on employers and the state fund even if they successfully defend numerous injuries, so long as the employee prevails on one injury. Moreover, under Holmes's regime, a claimant with great confidence in his right to participate for one injury would have every incentive to allege a multitude of injuries, knowing that he would be reimbursed for all costs and fees—even those related to long-shot claimed injuries. The facts here highlight the injustice of such a rule for employers and the state fund: The jury found Holmes was scratched (an injury treated with a bandage), but the trial court ordered Crawford to pay almost \$12,000 for costs and fees Holmes incurred as he unsuccessfully attempted to prove five other injuries. Holmes's rule steps beyond the goal of not unfairly reducing an employee's benefit award and turns .512(F) into a penalty against the state fund and employers and a windfall to employees.

2. The conflict between the Third District and the Tenth District is more a matter of degree than disagreement.

Holmes and the Third District identify a conflict between the opinion below and the Tenth District's decision in *Hollar*, but that conflict is not stark. *See* Holmes Br. at 8-12 ("Conflict with *Hollar v. Pleasant Township*"); App. Op. ¶ 82. At most, the lower courts vary in how strictly they examine the connection between a cost or fee and a successful request to participate for a particular injury. Although not a stark conflict, the District Courts do need this Court's guidance to sharpen the .512(F) inquiry.

According to Holmes, *Hollar* stands for the proposition that a claimant can recover costs and fees associated solely with unsuccessful efforts during a .512 proceeding, as long as the claimant is found eligible to participate in the fund for some injury. *See* Holmes Br. at 8-10. But the Tenth District said no such thing. Instead, *Hollar* held only that a trial court did not abuse its discretion by allowing a claimant to “recover his costs because he was successful with at least one of his [two] claims.” 2003-Ohio-6827, ¶ 20. And that holding is unsurprising given the facts of that case. There, the claimant asserted a right to participate for two injuries—“herniated disc at L5-S1” and “degenerative disc disease at L5-S1”—each of which involved the *same body part* (the L5-S1 disc on the spine). Therefore, it was reasonable for the trial court to not segregate costs and fees related to the claimant’s effort to prove each injury.

Holmes also cites *McGeehan v. Ohio State Bureau of Workers’ Compensation*, 2000 Ohio App. Lexis 6134 (10th Dist. 2000), on which the *Hollar* court relied, as evidence of the disagreement between Ohio’s appeals courts. In *McGeehan*, a claimant asserted a right to participate for three injuries. *Id.* at *1-2. Before the .512 trial began, but after the claimant’s attorney filed a complaint and conducted discovery, the employer conceded the claimant’s right to participate for one injury. *Id.* at *3. The jury subsequently found no right to participate for the other two injuries. *Id.* The trial court denied the claimant’s motion for attorney fees, reasoning that the claimant had not successfully established a right to participate *in* the .512 proceeding because the employer conceded that injury *before* the trial began. *Id.* at *7. The Tenth District reversed, holding that the claimant was entitled to attorney fees under .512(F) even though he established a right to participate for only one injury. But the court said nothing about the size or nature of the award. In fact, the court remanded for the trial court to determine the effort expended by claimant’s counsel and to make an appropriate award. *Id.* at *9.

Hollar and McGeehan do not stand for the broad proposition Holmes asserts. But because these decisions may have generated some confusion among lower courts about how to apply .512(F), the Court should take this opportunity to clarify .512(F) by answering the certified question “yes.”

CONCLUSION

For all of the reasons, the Court should answer the certified question “yes,” affirm the decision below, and remand for the trial court to determine which, if any, requested costs and fees must be denied because they are strictly related to the injuries Holmes failed to litigate successfully in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee, Administrator, Ohio Bureau of Workers' Compensation, was served by U.S. mail this 9th day of July, 2012, upon the following counsel:

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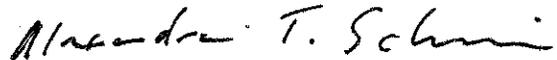
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APPENDIX

4121.36 Industrial commission hearing rules.

(A) The industrial commission shall adopt rules as to the conduct of all hearings before the commission and its staff and district hearing officers and the rendering of a decision and shall focus such rules on managing, directing, and otherwise ensuring a fair, equitable, and uniform hearing process. These rules shall provide for at least the following steps and procedures:

- (1) Adequate notice to all parties and their representatives to ensure that no hearing is conducted unless all parties have the opportunity to be present and to present evidence and arguments in support of their positions or in rebuttal to the evidence or arguments of other parties;
- (2) A public hearing;
- (3) Written decisions;
- (4) Impartial assignment of staff and district hearing officers and assignment of appeals from a decision of the administrator of workers' compensation to a district hearing officer located at the commission service office that is the closest in geographic proximity to the claimant's residence;
- (5) Publication of a docket;
- (6) The securing of the attendance or testimony of witnesses;
- (7) Prehearing rules, including rules relative to discovery, the taking of depositions, and exchange of information relevant to a claim prior to the conduct of a hearing;
- (8) The issuance of orders by the district or staff hearing officer who renders the decision.

(B) Every decision by a staff or district hearing officer or the commission shall be in writing and contain all of the following elements:

- (1) A concise statement of the order or award;
- (2) A notation as to notice provided and as to appearance of parties;
- (3) Signatures of each commissioner or appropriate hearing officer on the original copy of the decision only, verifying the commissioner's or hearing officer's vote;
- (4) Description of the part of the body and nature of the disability recognized in the claim.

(C) The commission shall adopt rules that require the regular rotation of district hearing officers with respect to the types of matters under consideration and that ensure that no district or staff hearing officer or the commission hears a claim unless all interested and affected parties have the opportunity to be present and to present evidence and arguments in support of their positions or in rebuttal to the evidence or arguments of other parties.

EXHIBIT A

(D) All matters which, at the request of one of the parties or on the initiative of the administrator and any commissioner, are to be expedited, shall require at least forty-eight hours' notice, a public hearing, and a statement in any order of the circumstances that justified such expeditious hearings.

(E) All meetings of the commission and district and staff hearing officers shall be public with adequate notice, including if necessary, to the claimant, the employer, their representatives, and the administrator. Confidentiality of medical evidence presented at a hearing does not constitute a sufficient ground to relieve the requirement of a public hearing, but the presentation of privileged or confidential evidence shall not create any greater right of public inspection of evidence than presently exists.

(F) The commission shall compile all of its original memorandums, orders, and decisions in a journal and make the journal available to the public with sufficient indexing to allow orderly review of documents. The journal shall indicate the vote of each commissioner.

(G)(1) All original orders, rules, and memoranda, and decisions of the commission shall contain the signatures of two of the three commissioners and state whether adopted at a meeting of the commission or by circulation to individual commissioners. Any facsimile or secretarial signature, initials of commissioners, and delegated employees, and any printed record of the "yes" and "no" vote of a commission member or of a hearing officer on such original is invalid.

(2) Written copies of final decisions of district or staff hearing officers or the commission that are mailed to the administrator, employee, employer, and their respective representatives need not contain the signatures of the hearing officer or commission members if the hearing officer or commission members have complied with divisions (B)(3) and (G)(1) of this section.

(H) The commission shall do both of the following:

(1) Appoint an individual as a hearing officer trainer who is in the unclassified civil service of the state and who serves at the pleasure of the commission. The trainer shall be an attorney registered to practice law in this state and have experience in training or education, and the ability to furnish the necessary training for district and staff hearing officers.

The hearing officer trainer shall develop and periodically update a training manual and such other training materials and courses as will adequately prepare district and staff hearing officers for their duties under this chapter and Chapter 4123. of the Revised Code. All district and staff hearing officers shall undergo the training courses developed by the hearing officer trainer, the cost of which the commission shall pay. The commission shall make the hearing officer manual and all revisions thereto available to the public at cost.

The commission shall have the final right of approval over all training manuals, courses, and other materials the hearing officer trainer develops and updates.

(2) Appoint a hearing administrator, who shall be in the classified civil service of the state, for each bureau service office, and sufficient support personnel for each hearing administrator, which support

personnel shall be under the direct supervision of the hearing administrator. The hearing administrator shall do all of the following:

- (a) Assist the commission in ensuring that district hearing officers comply with the time limitations for the holding of hearings and issuance of orders under section 4123.511 of the Revised Code. For that purpose, each hearing administrator shall prepare a monthly report identifying the status of all claims in its office and identifying specifically the claims which have not been decided within the time limits set forth in section 4123.511 of the Revised Code. The commission shall submit an annual report of all such reports to the standing committees of the house of representatives and of the state to which matters concerning workers' compensation are normally referred.
- (b) Provide information to requesting parties or their representatives on the status of their claim;
- (c) Issue compliance letters, upon a finding of good cause and without a formal hearing in all of the following areas:
 - (i) Divisions (B) and (C) of section 4123.651 of the Revised Code;
 - (ii) Requests for the taking of depositions of bureau and commission physicians;
 - (iii) The issuance of subpoenas;
 - (iv) The granting or denying of requests for continuances;
 - (v) Matters involving section 4123.522 of the Revised Code;
 - (vi) Requests for conducting telephone pre-hearing conferences;
 - (vii) Any other matter that will cause a free exchange of information prior to the formal hearing.
- (d) Ensure that claim files are reviewed by the district hearing officer prior to the hearing to ensure that there is sufficient information to proceed to a hearing;
- (e) Ensure that for occupational disease claims under section 4123.68 of the Revised Code that require a medical examination the medical examination is conducted prior to the hearing;
- (f) Take the necessary steps to prepare a claim to proceed to a hearing where the parties agree and advise the hearing administrator that the claim is not ready for a hearing.
- (l) The commission shall permit any person direct access to information contained in electronic data processing equipment regarding the status of a claim in the hearing process. The information shall indicate the number of days that the claim has been in process, the number of days the claim has been in its current location, and the number of days in the current point of the process within that location.
- (J)(1) The industrial commission may establish an alternative dispute resolution process for workers' compensation claims that are within the commission's jurisdiction under Chapters 4121., 4123., 4127., and 4131. of the Revised Code when the commission determines that such a process is necessary.

Notwithstanding sections 4121.34 and 4121.35 of the Revised Code, the commission may enter into personal service contracts with individuals who are qualified because of their education and experience to act as facilitators in the commission's alternative dispute resolution process.

(2) The parties' use of the alternative dispute resolution process is voluntary, and requires the agreement of all necessary parties. The use of the alternative dispute resolution process does not alter the rights or obligations of the parties, nor does it delay the timelines set forth in section 4123.511 of the Revised Code.

(3) The commission shall prepare monthly reports and submit those reports to the governor, the president of the senate, and the speaker of the house of representatives describing all of the following:

(a) The names of each facilitator employed under a personal service contract;

(b) The hourly amount of money and the total amount of money paid to each facilitator;

(c) The number of disputed issues resolved during that month by each facilitator;

(d) The number of decisions of each facilitator that were appealed by a party;

(e) A certification by the commission that the alternative dispute resolution process did not delay any hearing timelines as set forth in section 4123.511 of the Revised Code for any disputed issue.

(4) The commission may adopt rules in accordance with Chapter 119. of the Revised Code for the administration of any alternative dispute resolution process that the commission establishes.

Effective Date: 1996 HB413 10-01-1996

4123.512 Appeal to court.

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code 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 or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease, the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section 4123.511 of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section 4123.511 of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator of workers' compensation, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the

administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed forty-two hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H)(1) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(2)(a) Notwithstanding a final determination that payments of benefits made to or on behalf of a claimant should not have been made, the administrator or self-insuring employer shall award payment of medical or vocational rehabilitation services submitted for payment after the date of the final determination if all of the following apply:

- (i) The services were approved and were rendered by the provider in good faith prior to the date of the final determination.
- (ii) The services were payable under division (I) of section 4123.511 of the Revised Code prior to the date of the final determination.
- (iii) The request for payment is submitted within the time limit set forth in section 4123.52 of the Revised Code.

(b) Payments made under division (H)(1) of this section shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. If the employer of the employee who is the subject of a claim described in division (H)(2)(a) of this section is a state fund employer, the payments made under that division shall not be charged to the employer's experience. If that employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(c) Division (H)(2) of this section shall apply only to a claim under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code arising on or after the effective date of this amendment.

(3) A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund

account due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund account on account of those payments and shall not be required to pay any amounts into the surplus fund account on account of this section. The election made under this division is irrevocable.

(I) All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections 4123.511 and 4123.512 of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514, 4123.515, 4123.516, and 4123.519 and section 4123.522 of the Revised Code.

Amended by 129th General Assembly File No. 16, HB 123, § 101, eff. 7/29/2011.

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