

IN THE SUPREME COURT OF OHIO

Jeff Holmes :
 :
 Appellant, : Case No. 2011-2040
 :
 v. : On Appeal from the
 Crawford Machine, Inc., et al. : Crawford County Court of Appeals,
 : Third Appellate District
 Appellees. :

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LAW AND ARGUMENT

The Employer, Ohio Manufacturers' Association, Ohio Self-Insurers Association, Ohio Chamber of Commerce, Ohio Chapter of the National Federation of Independent Business, and Bureau of Workers' Compensation (hereinafter "Respondents") concede that the R.C. 4123.512(D) stenographer costs are not at issue here. However, Respondents want this Court to limit R.C. 4123.512(F) by apportioning attorney fees and costs between successful and unsuccessful conditions when a party is found eligible to participate in the state insurance fund. This argument is in conflict with R.C. 4123.512(F) and ensuing case law.

Respondents first assert that reimbursement of attorney fees and costs is inappropriate when related to an unsuccessful condition at trial. Respondents argue that attorney fees and costs must be apportioned when adjudication results in both successful and unsuccessful conditions. In support of this statement, Respondents cite *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 569 N.E.2d 464 and *Schuller v. U.S. Steel Corp.*, 103 Ohio 157, 2004-Ohio-4753. Respondents assert that these cases together mean that a claimant can recover fees and costs under R.C. 4123.512(F), if those expenses are related to a successful right to participate and those expenses were reasonably related to that success.

Notably, *Bittner* addresses attorney fees under R.C. 1345.09(F)(2) of the Consumer Sales Practices Act, not under R.C. 4123.512(F). However, this Court explained in *Bittner* that a number of factors are considered when calculating attorney fees, including the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the results obtained. *Bittner*, 58 Ohio St.3d at 145-146.

A relevant point from *Bittner* to mention is that attorneys may spend time and energy pursuing a claim that reaps relatively small benefits for a prevailing plaintiff. This Court values the importance of a plaintiff's ability to pursue a case, despite the value, and in *Bittner* noted agreement with "the United States Supreme Court when it said: "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious *** claims but relatively small potential damages to obtain redress from the courts." *Bittner*, 58 Ohio St.3d at 144 (citing *Riverside v. Rivera*, 477 U.S. 561, 578 (1986)). In *Bittner*, the Defendant alleged that the case arose from a mere \$200 technical violation of the Consumer Sales Practices Act.

Comparatively, even though Respondents describe the claim as a "Band-Aid" injury, each claimant is still entitled to redress from the courts under R.C. 4123.512. Prohibiting attorneys and claimants from recovering the costs, time, and energy exerted undermines the purpose of R.C. 4123.512(F).

Additionally, the *Bittner* Defendant alleged that the only issue in the case was whether it failed to give the Plaintiff a deposit receipt, which if proven, was only a \$200 damage award. For seven months, the Defendant denied any violation of the Act and did not settle until the morning of trial. Therefore, the Plaintiff was forced to expend the time and effort to proceed with litigation. *Bittner*, 58 Ohio St.3d at 145. Similarly, here, the Employer could have conceded to the right fifth finger abrasion, based on the overwhelming evidence, but did not. Therefore, the Plaintiff was forced to proceed and prepare for trial on all conditions. Adamantly contesting a case and then prohibiting an attorney and claimant from reimbursement of expenses frustrates the intention of R.C. 4123.512(F).

Further, *Bittner* does explain that the trial court should award fees for time spent pursuing the successful claim and the trial court judge is in the best possession to determine the attorney

fees. *Bittner*, 58 Ohio St.3d at 145. Here, Respondents argue that the trial court, without holding a hearing or requesting additional information, issued an order awarding attorney fees and costs. It is important to note that the same trial judge tried the case and issued the order granting the expenses. Certainly, this judge was able to make a final determination without a hearing or additional information based upon his familiarity of the expenses and effort expended.

Respondents also rely upon *Schuller*, which supports reimbursement of costs pursuant to R.C. 4123.512(F). In *Schuller*, an expert witness's fee for live in-court testimony was deemed a reimbursable cost of legal proceedings pursuant to R.C. 4123.512(F) since testimony is vital to a claimant's ability to prove that his injuries meet the workers' compensation requirements. *Schuller*, 2004-Ohio-4753. Here, Plaintiff's expert testified as to the Plaintiff's injuries and what constitutes an abrasion. This testimony was needed to prove that the injury met the requirements and therefore, the eligibility to participate in the state insurance fund.

This Court noted that in prior decisions, it has interpreted "cost of any legal proceedings" broadly, recognizing that the purpose of reimbursement under R.C. 4123.512(F) is "to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund." *Schuller*, 2004-Ohio-4753 at ¶7 (citing *Moore v. Gen. Motors Corp.*, 18 Ohio St.3d 259, 262, (1985)). Furthermore, *Schuller* declared that the trial court shall determine the reasonableness of the fee. *Schuller*, 2004-Ohio-4753 at ¶13.

Contrary to Respondent's assertion, R.C. 4123.512(F) allows for reimbursement of costs for a successful workers compensation appeal. As required by R.C. 4123.512(F), the Appellant successfully proved his right to participate in the state insurance fund. This Court accepted the significance of claimants who are found successful, noting that "[t]hese claimants incur out-of-

the-ordinary expense in order to establish their right to participate, additional expense that other claimants do not incur.” *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 187, 749 N.E.2d 267.

Further, Ohio courts have recognized that attorney fees and costs are recoverable even when claimants were not successful on all requested conditions. *Hollar v. Pleasant Township*, 10th Dist. No. 03-AP-250, 2003-Ohio-6827 (claim allowed for aggravation of pre-existing degenerative disc disease and L5-S1 but not for herniated disc at L5-S1); *McGeehan*, 10th Dist. No. 00AP-648 (employer conceded to lumbar sprain/strain and jury denied aggravation of pre-existing lumbar degenerative disc disease and lumbar instability); *Azbell v. Newark Group, Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639 (claim allowed for cervical strain but denied for left shoulder strain, left shoulder tendonitis and aggravation of pre-existing acromioclavicular arthritis, the court found that claimant was successful because one of the four requested conditions as allowed); *Carrigan v. Shaferly Excavating Ltd.*, (2011), 3rd Dist. No. 13-11-08, 2011-Ohio-5587 (claim allowed for cervical disc herniation at C5-6 and denied for skin sensation and disc degeneration).

Respondents’ second argument is that Appellant’s injury only required a “Band-Aid,” which required no expense in proving and for which no further benefits from the claim will be paid. And consequently, no reimbursement of expenses is warranted. Nonetheless, R.C. 4123.512(F) only requires that a claimant establishes his “right to participate or continue to participate in the fund.” R.C. 4123.512(F) does not require that the successful condition be of a certain value or threshold. The magnitude of the injury is not important. As long as the injury is deemed work-related, R.C. 4123.512(F) provides for reimbursement of fees, which is subject to the trial court finding the cost reasonable. *Schuller*, 2004-Ohio-4753 at ¶13.

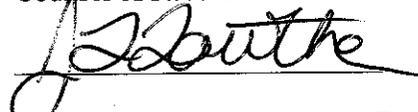
Lastly, Respondents contend that adopting Appellant's position would have a chilling effect on all Ohio employers and send a message that it is too costly to do business in Ohio. Respondents go further to argue that adopting their position might discourage some of the marginal claims that are filed into court. On the contrary, apportioning attorney fees and costs would deter deserving claimants from contesting their right to participate because of the cost of litigation, not because of the merit of the claim.

In this case, Appellant was granted the right to participate administratively for all requested conditions (electrical shock, left shoulder strain, left rotator cuff tear, low back strain, left posterior shoulder dislocation, and right fifth finger abrasion) and the Employer appealed pursuant to R.C. 4123.512. Appellant was required to defend his right to continue to participate in the state insurance fund and was successful. Since he was successful at trial, he is a deserving claimant and attorney fees and costs should be reimbursed pursuant to R.C. 4123.512(F).

CONCLUSION

For the reasons set forth above, the Appellant, Jeff Holmes, respectfully requests that this Court answer the certified question "no" since the Appellant was successful at trial and find that attorney fees and costs are recoverable upon a final determination granting the right to participate in the state insurance fund for at least one condition.

Respectfully submitted,
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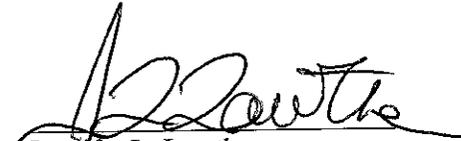
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