[Cite as *Cosgrove v. Omni Manor,* 2016-Ohio-8481.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ELIZABETH COSGROVE, PLAINTIFF-APPELLEE, VS. OMNI MANOR et al., DEFENDANTS-APPELLANTS.	)))))))))	CASE NO. 15 MA 0207 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13 CV 3496

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Carol Ann Robb
Hon. Timothy P Cannon of the Eleventh District Court of Appeals, Sitting by assignment.
Hon. Thomas R. Wright of the Eleventh District Court of Appeals, Sitting by assignment.

Dated: December 16, 2016

[Cite as *Cosgrove v. Omni Manor,* 2016-Ohio-8481.]
ROBB, J.

{¶1} Defendant-Appellant Omni Manor, Inc. ("the employer") appeals the decision of the Mahoning County Common Pleas Court after a jury verdict was rendered in favor of Plaintiff-Appellee Elizabeth Cosgrove ("the worker") on her workers' compensation case. The case arose after a staff hearing officer at the Industrial Commission denied the worker's right to participate in the fund and the Industrial Commission refused to hear her appeal.

{¶2} First, the employer asserts the jury allowed the worker to participate for a condition which did not proceed through the administrative process as required by the Ohio Supreme Court's *Ward* case. The employer failed to raise this argument in a motion prior to trial or during trial. The employer argues the issue is one of subject matter jurisdiction which renders a judgment void and can be raised at any time. However, we conclude the employer's argument concerns "the court's exercise of jurisdiction over a particular case" rather than subject matter jurisdiction. The employer waived the argument of which condition could be submitted to the jury by allowing the case to proceed through trial without properly raising the matter.

{¶3} The employer also claims the verdict was based upon misconduct of the worker's counsel during the rebuttal portion of closing arguments. Lastly, the employer contends the amount of fees awarded to the worker's expert witness was not shown to be reasonable. These arguments are without merit.

{¶4} For reasons expressed further herein, Appellant's three assignments of error are overruled, and the trial court's judgment is affirmed.

PROCEDURAL HISTORY

{¶5} On August 29, 2011, a district hearing officer at the Bureau of Workers' Compensation (BWC) allowed the worker to participate for the condition of lumbar strain/sprain. The employer appealed to the Industrial Commission for review by a staff hearing officer. On October 6, 2011, the worker filed a C-86 form seeking additional allowances for herniated nucleus pulposus at L3-L4 with an extruded fragment and spinal stenosis at L3-L4 and L4-L5.

{¶6} The hearing before the staff hearing officer was held on October 7, 2011. The staff hearing officer vacated the decision of the district hearing officer and stated the worker's first report of injury application filed August 1, 2011 was denied. The staff hearing officer found the worker did not sustain an injury in the course of and arising out of employment and said the worker failed to show she sustained a new work-related injury on June 14, 2011. The decision says the physician's notes failed to indicate the worker's low back pain was due to the June 14, 2011 injury.

{¶7} On October 31, 2011, the Industrial Commission refused to hear the worker's appeal. Pursuant to R.C. 4123.512(A), the worker appealed and filed a complaint in the trial court. The case was voluntarily dismissed but refiled on December 11, 2013. The complaint asserted the right to participate for lumbar sprain/strain, herniated nucleus pulposus at L3-L4 with an extruded fragment, and spinal stenosis at L3-L4 and L4-L5. The employer's answer claimed the court lacked subject matter jurisdiction over all claims except lumbar sprain/strain because the other conditions were never adjudicated administratively. This defense was not subsequently mentioned on the record before or during trial.

{¶8} A jury trial proceeded before a magistrate. As to the worker's right to participate, the jury was presented with three verdict forms: (1) L3-L4 right sided disc extrusion (herniation) with migrating free fragment; (2) spinal canal stenosis at L3-L4; and (3) spinal canal stenosis at L4-L5. The jury found the worker was entitled to participate for the herniation with extrusion but was not entitled to participate for the two levels of stenosis.

{¶9} The magistrate's decision memorializing the jury verdict was filed on August 14, 2015. The employer filed objections raising subject matter jurisdiction, manifest weight of the evidence, and misconduct during closing arguments. On October 15, 2015, the trial court overruled the objections, adopted the magistrate's decision, and entered judgment for the worker in accordance with the jury verdict.

{¶10} The employer appealed the trial court's judgment. This court held the appeal in abeyance to permit the trial court to rule on the worker's motion for fees and costs. The employer contested the amount of fees ($5,000) requested for the

deposition testimony of the orthopedic spine surgeon. On February 4, 2016, the trial court granted the worker's fee request, including $5,000 in expert witness fees for the spine surgeon. The employer filed an additional notice of appeal resulting in 16 MA 0028, which was consolidated into the original appellate case: 15 MA 0207.

STATEMENT OF THE CASE

{¶11} The employer operated Omni Manor Windsor House in Youngstown, Ohio. The worker commenced employment there in 1999, working full-time in the laundry room. On June 14, 2011, another employee hit this worker with the laundry room door, knocking her to the side where her fall was prevented by the dryers. (Tr. 78-79). She testified she felt as if she had been stabbed in the back. (Tr. 80). Although she suffered chronic back pain for years, she said this pain felt different and was in a different location. (Tr. 81-82). She completed an incident report.

{¶12} The worker saw her family physician, Dr. Catterlin, on June 20 and 22, 2011. She was previously treated for lumbar strain/sprain and sciatica, and Dr. Catterlin initially made the same diagnosis after the workplace incident. (Tr. 317, 373). He ordered an MRI, which showed a herniated disc at L3-L4 (to the right) extruding into a free fragment of disc material. This condition was not present on a 2002 MRI taken after a 2001 motor vehicle accident; the prior MRI showed a protruded disc at a different level (L4-L5) and direction (to the left), bulges at L2-L3 and L3-L4, and signs of arthritis and stenosis at this and the L3-L4 level. (Tr. 261, 263, 286, 300-301, 323, 384, 386, 425). A 1999 X-ray after a different motor vehicle accident showed arthritis and stenosis at the L4-L5 disc space and spurs. (Tr. 258-259, 369).

{¶13} The employer was a self-insured employer. In a July 19, 2011 letter to the employer, Dr. Catterlin said he was unable to state the herniation was caused by the workplace incident, but he added he could not say the herniation was not caused by the incident either. He noted the worker's pre-existing back issues but pointed out she had been stable for years. (Tr. 330-331). On the same date, Dr. Catterlin completed BWC form C9. As an additional condition, he listed the herniated disc at L3-L4. He attached the MRI. He refrained from answering the question as to

whether the condition was related to the workplace incident. (Tr. 334). Dr. Catterlin referred the worker to an orthopedic spine surgeon, Dr. Musser.

{¶14} Dr. Musser examined the worker on August 24, 2011 and provided a report to the worker's attorney on September 24, 2011. He testified herniation of a disc can be caused by an acute trauma and twisting, such as the workplace incident at issue. (Tr. 215-216, 271). He noted the extruded piece of disc material had ripped through a ligament. (Tr. 204, 215). Dr. Musser explained the prior bulging and arthritis were unrelated to the current problem. (Tr. 278). He said the herniation at L3-L4 also caused stenosis or narrowing of the canal at L3-L4 and L4-L5, which he said was different than the earlier depictions of stenosis. (Tr. 202, 217, 229-230, 262, 264-265).

{¶15} Based upon Dr. Musser's opinion, Dr. Catterlin wrote a letter on November 7, 2011, saying he believed the herniation was caused by the workplace incident. (Tr. 336-337). At trial, he pointed out the worker did not present with the same symptoms before the incident. (Tr. 340).

{¶16} The employer presented the testimony of Dr. Gula who examined the worker on November 21, 2014. He believed the workplace incident she experienced would not normally cause a herniation or extrusion. (Tr. 452). He testified an extrusion can develop due to diffuse disease and time. (Tr. 466-467). He also said any stenosis occurred over the course of time, noting the narrowing on the 1999 X-rays and the 2002 MRI. (Tr. 452, 455, 457-458, 475). He concluded the worker's conditions were not sustained as a result of the incident. (Tr. 473).

ASSIGNMENT OF ERROR ONE: SUBJECT MATTER JURISDICTION

{¶17} The employer sets forth three assignments of error. The first assignment of error provides:

"THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CONDITION IN WHICH THE JURY RENDERED ITS VERDICT."

{¶18} In support of this argument, the employer relies on the case of *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, 830 N.E.2d 1155. In that case, a self-insured employer allowed the employee to participate for right knee sprain but

disallowed two other knee conditions. A district hearing officer ruled likewise, and a staff hearing officer affirmed. *Id.* at ¶ 1. The complaint filed in the trial court sought participation for the two disallowed conditions. The employee was then permitted to amend the complaint to add preexisting degenerative joint disease and aggravation of preexisting osteoarthritis. *Id.* at ¶ 2. The employee dismissed one of the original claimed conditions, and the jury found against the employee on the other one. *Id.* at ¶ 2-3. The jury found in favor of the employee on the two conditions added in the amended complaint. *Id.* at ¶ 3.

{¶19} On appeal, this court reversed holding the trial court exceeded its jurisdiction by permitting the employee to amend his complaint to add conditions which were never presented to the administrative body. *Ward v. Kroger Co.*, 7th Dist. No. 03 JE 40, 2004-Ohio-3637, ¶ 28. The issue presented to the Supreme Court was "whether the scope of an R.C. 4123.512 appeal is limited to the medical conditions addressed in the order from which the appeal is taken." *Ward*, 106 Ohio St.3d 35 at ¶ 6.

{¶20} The Supreme Court noted two opposing appellate court views: some appellate courts believed the broad issue of the right to participate encompassed any additional injuries that might be revealed by the evidence in the judicial proceedings; and other courts believed the worker was precluded from litigating a new or different condition. *Id.* at ¶ 7-8. The Supreme Court noted the latter courts "view the order appealed as framing the jurisdiction of the common pleas court, finding that the claimant must first present all alleged conditions before the administrative body and that only the conditions adjudicated by the administrative order are properly before the court of common pleas." *Id.* at ¶ 8. The Court found these courts "come closer to the mark." *Id.* at ¶ 9.

{¶21} "The requirement that workers' compensation claims be presented in the first instance for administrative determination is a necessary and inherent part of the overall adjudicative framework of the Workers' Compensation Act." *Id.*, citing

R.C. 4123.512(A).[1] This statute "clearly contemplates the general nonappealability of commission orders and, in the case of claims for initial allowance, withholding judicial review until after the claim runs the gamut of successive administrative hearings provided for under R.C. 4123.511." *Id*.

> Allowing consideration of the right to participate for additional conditions to originate at the judicial level is inconsistent with this statutory scheme because it usurps the commission's authority as the initial adjudicator of claims and casts the common pleas court in the role of a claims processor. A claimed right of participation in the fund is not a generic request. There is no such thing as a workers' compensation claim for "an injury." A workers' compensation claim is simply the recognition of the employee's right to participate in the fund for a specific injury or medical condition, which is defined narrowly, and it is only for that condition, as set forth in the claim, that compensation and benefits provided under the act may be payable. Nor is the right to participate an all-encompassing one-time final determination. The grant or denial of the right to participate for one injury or condition does not preclude a subsequent claim for participation in the fund based on another injury or condition arising out of the same industrial accident. But any such claim must be initiated before the Industrial Commission.
>
> Clearly, then, each injury or condition that is alleged to give the claimant a right to participate in the Workers' Compensation Fund must be considered as a separate claim for purposes of R.C. 4123.511 and 4123.512, and each such claim must proceed through the administrative process in order to be subject to judicial review. Thus,

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[1] This statute provides: "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 * * *". R.C. 4123.512(A). "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." *Id*

> as aptly explained by the court of appeals, "order is lost, fairness is jeopardized, and the statutory framework is destroyed when the administrative process is merely used as a conduit to get the first claim to the trial court (win or lose) in order to raise other conditions for the first time in the trial court after bypassing the administrative process." Simply put, R.C. 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level.

Id. at ¶ 10-11. The Supreme Court concluded: "the claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken." *Id.* at ¶ 17.

{¶22} The employer urges *Ward* is factually on point. On the "first report of injury" form, Dr. Catterlin listed lumbar strain and sprain and sciatic neuralgia. As the self-insured employer contested this, the matter proceeded to the BWC. The district hearing officer allowed the worker to participate for lumbar strain/sprain, and the staff hearing officer vacated this decision upon the employer's appeal. The employer concludes the only condition decided by the staff hearing officer was the condition which the employer appealed. The employer reasons the Industrial Commission never heard or adjudicated any of the additional conditions listed in the worker's complaint filed upon appeal to the trial court. As a result, the employer asserts the jury verdict allowing the worker to participate for "L3-4 right sided disc extrusion (herniation) with migrating free fragment" was impermissible.

{¶23} The worker points out the complaint she filed in the trial court listed the medical condition for which the jury allowed her to participate. (Although the lumbar sprain/strain was in the complaint, the worker did not proceed on this claim at trial or present it to the jury.) She also emphasizes that she did not try a claim different than ones listed in the complaint. This is not dispositive as *Ward* was premised on what medical conditions proceeded through the administrative process, not what medical conditions were listed in the complaint. The issue was not that the employee amended the complaint to add a new condition but that the employee sought a ruling

in the trial court for a condition that never "ran the gamut" of administrative proceedings.

{¶24} The worker contends her case is more closely aligned to the Supreme Court's later *Bennett* case. She states she was required to try the entire claim de novo, noting the holding: "we hold that the de novo nature of an R.C. 4123.512 appeal proceeding puts at issue all elements of a claimant's right to participate in the workers' compensation fund." *Bennett v. Administrator, Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666, ¶ 2.

{¶25} *Bennett* dealt with a distinct situation. "Bennett filed a claim with the Bureau of Workers' Compensation ("BWC") for injuries to his head, neck, and back that he claimed to have suffered in the accident, along with his statement that he had been treated for a concussion and multiple disk herniation." *Id.* at ¶ 3. Throughout each administrative stage, the employee was not permitted to participate due to the "coming-and going rule." *Id.* at ¶ 4. Upon the employee's appeal to the trial court, the trial court granted summary judgment due to the rule. *Id.* at ¶ 5. The appellate court reversed and remanded, concluding the facts could support the employee's claim that he had no fixed place of employment and was working (rather than commuting) while driving to the employer. *Id.* at ¶ 6.

{¶26} After a bench trial on remand, the trial court ruled in favor of the employee on the "coming-and-going rule" but found he did not present evidence of a medical condition or a causal relationship between the injury and the accident (described as the elements of the claim). *Id.* at ¶ 7-9 (granting a directed verdict). The appellate court affirmed. *Id.* at ¶ 10. Before the Supreme Court, the employee argued that only those issues determined by the administrative order on appeal can be considered in an R.C. 4123.512 appeal. *Id.* at ¶ 13. The Supreme Court held "the de novo nature of an R.C. 4123.512 appeal proceeding puts at issue all elements of a claimant's right to participate in the workers' compensation fund." *Id.* at ¶ 2.

{¶27} The Court pointed out how an appeal under R.C. 4123.512 is unique in that it involves a trial de novo on the issue of the right to participate (or to continue to participate). *Id.* at ¶ 17-20, 30 (factual and legal issues are determined de novo). As

a result, the evidence is not limited to that presented in the administrative proceedings, there is no deference to the administrative agency, and there is no remand to the administrative body. *Id.* at ¶ 20-24. "The fundamentals of the de novo appeal under R.C. 4123.512 required Bennett to establish his right to participate in the fund, including the injury-related and causation aspects of his claim relevant to that question, in the common pleas court." *Id.* at ¶ 30.

{¶28} In addressing Bennett's citation to *Ward*, the Supreme Court pointed out Bennett's case was "fundamentally distinguishable" and did not involve new medical conditions (at issue in *Ward*). *Id.* at ¶ 26-27. "*Ward* involved a discrete situation in which a specific medical condition was administratively considered and the claimant then attempted to add new conditions in his R.C. 4123.512 appeal." *Id.* at ¶ 26.

{¶29} In accordance, *Bennett* did not alter *Ward*. It is *Ward* that governs a case where new conditions are raised in the trial court. *Bennett* spoke of the employee's obligation at the trial court level to address all "elements" of the "claim" relevant to his right to participate. *Bennett* deals with the claim brought at the administrative level, even when the agency did not rule on the condition raised due to application of the "coming-and-going rule." The trial court had no ability to remand after a decision on the "coming-and-going rule," and thus, the presentation of the remaining elements of the claim he filed below was mandatory. *Bennett* did not mention a right to add conditions that were not at issue administratively.

{¶30} The worker urges the staff hearing officer ruled no injury occurred as a result of the June 14, 2011 incident, essentially barring her from raising any other condition administratively. Upon announcing the worker's "first report of injury" application was denied, the staff hearing officer said: "It is the finding of the Staff Hearing Officer that the Injured Worker did not sustain *an injury* in the course of and arising out of employment." (Emphasis added by the worker). After saying Dr. Catterlin's notes failed to indicate the low back pain was due to an injury occurring on June 14, 2011, it was stated: "the Staff Hearing Officer finds by a preponderance of the evidence that the Injured Worker failed to show that she sustained a new work

related injury occurring on or about 06/14/2011 while working for the above stated Employer. Therefore, this claim is denied."

{¶31} The employer points out the staff hearing officer's order recited that the claim was previously allowed for lumbar sprain/strain. The staff hearing officer's order also noted the district hearing officer's order (allowing participation for lumbar sprain/strain) was appealed by the employer. The employer suggests this explicitly limited the issue being considered by the staff hearing officer.

{¶32} The worker attempts to distinguish *Ward* by contending the staff hearing officer's order which she appealed to the trial court should be viewed as a decision denying the claim in its entirety, for any possible injury. In *Ward*, the employee was permitted to participate by the employer for knee sprain, appealed the denial of two other medical conditions to the trial court, but then added yet more medical conditions. Here, the worker was not permitted to participate by the administrative body. (The worker was permitted to participate for lumbar sprain/strain by the district hearing officer, but this was vacated by the staff hearing officer.)

{¶33} The employer responds by emphasizing the language in *Ward* that there is no such thing as a worker's compensation claim for an injury; rather, there is a right to participate for a specific medical condition. Each condition is a separate claim giving rise to a right to participate which must run the gamut of the administrative process. Although *Ward* contained the additional fact that a sprain had been allowed at the same time other conditions were denied, the Supreme Court did not rely on this fact at any point in its analysis; the Court's analysis seems to apply equally where the case appealed to the trial court has no allowed condition.

{¶34} The worker's concerns are embodied in an administrative order quoted in the Tenth District's *Cuckler* case. The Tenth District was ruling on a writ of mandamus where an employee sought to compel the Industrial Commission to rule on a new "first report of injury" and/or a C-86 requesting additional allowances. *See State ex rel. Cuckler v. Indus. Comm.*, 10th Dist. No. 15AP-53, 2015-Ohio-5081, ¶ 21-23. In the quoted order, the hearing officer said: a disallowed claim was wholly distinct from a claim allowed for one condition but not another; *Ward* was

distinguishable on this basis; an order disallowing a claim for a condition was the disallowance of the claim in its entirety; and the agency had no jurisdiction to rule on a new claim asserting a different condition from the same workplace incident and could not permit an additional allowance from a disallowed claim.

{¶35} The Tenth District did not rule on the issue as it found mandamus inappropriate; the court found the employee had an adequate remedy at law via her pending trial court appeals. *See id.* at ¶ 43 (this was a decision by the Tenth District's magistrate which was adopted after no objections were filed in the appellate court). It is noted that in one of those pending appeals, the Ross County Common Pleas Court granted a BWC motion to preclude the employee from presenting evidence of conditions which were not part of the claim that was denied administratively. *See id.* at ¶ 16-18.

{¶36} Notwithstanding the position taken by the Industrial Commission in *Cuckler*, one of the cases cited by the Supreme Court in *Ward* had a background similar to the case before us. In *Williams v. Timken*, the employee's only claim (strain of neck and left shoulder) was denied administratively. On appeal, the trial court refused to allow amendment of the complaint to add a different condition. The Fifth District upheld this decision, holding the statute permitting appeal to the trial court "presupposes that the matter appealed has been presented to the agency below. Otherwise it cannot properly be the subject of an appeal." *Williams v. Timken Co.*, 5th Dist. No. CA-6346 (Oct. 1, 1984). The *Williams* case was cited in *Ward* as part of the collection of cases which prohibited the presentation of a medical condition at a de novo trial if it was not presented to the administrative body. *Ward*, 106 Ohio St.3d 35 at ¶ 8.

{¶37} In addition, the First District recently applied *Ward* where no claim was allowed administratively. *See Marshall v. Oncology/Hematology Care, Inc.*, 1st Dist. No. C-130659, 2014-Ohio-2253. In *Marshall*, the employee's claim was denied administratively. The staff hearing officer said the employee did not meet her burden to prove "she sustained an injury during the course of and arising out of her employment." On appeal, the employee argued that, due to the use of the generic

term "injury," the decision was not limited to a specific condition and she could raise other conditions at the de novo hearing in the trial court. *Id.* at ¶ 7. The First District disagreed saying the condition she sought to try was never before the Industrial Commission. *Id.* at ¶ 8, citing *Ward*, 106 Ohio St.3d 35. Since the Industrial Commission's decision only pertained to certain conditions, only those conditions were properly before the trial court. *Id.* The First District applied *Ward* to the appeal in the trial court even though the administrative body did not allow the claim.[2]

{¶38} Under the rule in *Bennett*, all elements of the claim are at issue, but under the rule in *Ward*, the claim is narrowly defined and delineates the scope of the trial court's review. *Bennett* reviewed and did not alter *Ward*. The holdings in *Ward* are broadly-worded and apply generally to what constitutes a claim. We reiterate some of these broad holdings of *Ward*.

{¶39} Claims must be presented in the first instance for administrative determination. *Ward*, 106 Ohio St.3d 35 at ¶ 9. A claim for an initial allowance must run the gamut of administrative hearings. *Id.* The administrative agency is the initial adjudicator of claim, and the trial court cannot be relegated to the role of claims processor by the addition of conditions at that level. *Id.* at ¶ 10. "A claimed right of participation in the fund is not a generic request. There is no such thing as a workers' compensation claim for 'an injury.'" *Id.* The claim "is simply the recognition of the employee's right to participate in the fund for a specific injury or medical condition, which is defined narrowly, and it is only for that condition, as set forth in the claim, that compensation and benefits provided under the act may be payable." *Id.*

{¶40} The right to participate is not an all-encompassing, one-time, final determination. *Id.* "The grant *or denial* of the right to participate for one injury or condition does not preclude a subsequent claim for participation in the fund based on another injury or condition arising out of the same industrial accident." (emphasis

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[2] The *Marshall* case also had a separate section pertaining to a second trial court appeal. Thereunder, the First District held a worker cannot appeal to the trial court a decision that the Industrial Commission lacked jurisdiction as such a decision does not involve "the right to participate." *Marshall*, 1st Dist. No. C-130659 at ¶ 10-13. This would seem to conflict with the Tenth District's

added.) *Id.* Each injury or medical condition that is alleged to give the claimant a right to participate must be considered a separate claim, and each claim must proceed through the administrative process in order to be subject to judicial review. *Id.* at ¶ 11. The administrative process cannot be used "as a conduit to get the first claim to the trial court (win or lose) in order to raise other condition for the first time in the trial court after bypassing the administrative process." *Id.*, quoting *Ward*, 7th Dist. No. 03 JE 40 at ¶ 11. The claimant is not forced to request or waive the allowance of all discoverable conditions in a single proceeding. *Id.* at ¶ 12.

{¶41} Although *Ward* involved a case where the worker was initially allowed to participate for a strain, the Court never focused on the fact there was a prior allowed condition. The holdings in *Ward* appear to broadly apply to any appeal under R.C. 4123.512, i.e., *Ward* limits the triable medical conditions to those presented in the claim(s) before the administrative body.

{¶42} The worker alternatively argues the medical condition awarded by the jury verdict was sufficiently before the administrative body to permit the condition to be tried in the trial court. The worker says evidence on her L3-L4 disc herniation and extrusion with a free fragment was in the administrative file when the appealed order was made, pointing to: the June 28, 2011 fax to the employer with the diagnosis and MRI showing the herniation; the July 19, 2011 C-9 form submitted to the self-insured employer wherein Dr. Catterlin asked to add the condition of herniation; the contemporaneous letter from Dr. Catterlin; and the September 24, 2011 letter from Dr. Musser opining the June 14, 2011 injury caused the herniation and severe pain. In addition, she filed a BWC form C-86 on October 6, 2011, where she moved for an additional allowance due to the herniation. The worker emphasizes the staff hearing officer's statements: "All evidence on file has been considered in rendering this decision" and "This order is based upon a review of the entire state file * * *" (after which it was found Dr. Catterlin's notes failed to indicate the low back pain was due to any injury on June 14, 2011).

Cuckler decision finding the employee's appeal to the trial court was an adequate remedy at law to address the Industrial Commission's refusal to exercise jurisdiction.

{¶43} The employer urges this language is mere boilerplate and does not evince the herniation was at issue. The employer notes the appeal to the staff hearing officer was from the decision of the district hearing officer. The employer points out the C-86 was filed *the day before* the case was heard *by the staff hearing officer*. The additional condition had not been considered by the district hearing officer. (If the district hearing officer considered the condition, then it was rejected when the district hearing officer's August 29, 2011 order allowed the claim for lumbar sprain/strain; the worker did not appeal the district hearing officer's order.)

{¶44} The staff hearing officer's order recited the claim was previously allowed by the district hearing officer for lumbar sprain/strain and the employer appealed this order by the district hearing officer. The staff hearing officer's decision says, "the Injured Worker's First Report of Injury Application filed August 1, 2011 is denied." The worker's "first report of injury" application, which initiated the claim, did not include the condition of herniation. This was why she filed a C-86 for an additional allowance.[3] The employer would have been justified in raising the argument that the condition of herniation/extrusion was not part of the case to be tried to the jury. However, the employer failed to do so in the proper manner prior to trial.

{¶45} In general, affirmative defenses must be "timely asserted and maintained," meaning the party seeking to benefit from a doctrine has the obligation to raise and argue it, not merely set it forth in an answer. *See, e.g., Dworning v. Euclid,* 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, ¶ 11 ("The failure to exhaust administrative remedies is not a jurisdictional defect but is rather an affirmative defense, if timely asserted and maintained"); *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462-463, 674 N.E.2d 1388 (1997), syllabus (failure to exhaust administrative remedies is not a jurisdictional defect to a declaratory judgment action; it is an affirmative defense which must be timely asserted and maintained).

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[3] In objections to the magistrate's decision, the employer cited to documents filed by Dr. Catterlin and the worker after her appeal to the trial court. These documents state they were still awaiting a hearing on the additional allowance of intervertebral disc disorder with myelopathy in the lumbar region; the employer provided a definition indicating this disorder includes disc herniation.

{¶46} In other words, the answer is not self-executing. *See, e.g., Parkstone Capital Partners v. Solon*, 8th Dist. No. 99241, 2013-Ohio-3149, ¶ 20. In the key case relied upon by the employer above, the issue (as to which medical condition was properly before the trial court) was raised before trial by objecting to a request to amend the complaint. *See Ward*, 106 Ohio St.3d 35 at ¶ 2.

{¶47} Here, the employer's answer raised a defense claiming the court lacked jurisdiction over the herniated/extruded disc because this medical condition was not adjudicated administratively. Nevertheless, this defense was not "maintained" thereafter. The employer filed no pretrial motion. For instance, the employer did not seek partial summary judgment under Civ.R. 56 as to this medical condition. The employer did not seek a ruling in limine on the evidence of herniation/extrusion. The employer did not raise the issue at trial during presentation of testimony on herniation and extrusion or during closing arguments. No objection was raised to the jury instructions or the jury verdict forms containing this medical condition. The employer waited to raise the issue until after trial in its objections to the magistrate's decision which memorialized the jury verdict on this medical condition.

{¶48} To avoid the implications of forfeiture, the employer asserts the issue is one of subject matter jurisdiction, i.e., the trial court lacked subject matter jurisdiction over this particular medical condition of herniation/extrusion. The employer relies on the principle that a lack of subject matter jurisdiction renders a decision void ab initio and is not waived on appeal by the failure to timely raise it below. We recognize the worker does not dispute that a *Ward* issue is a matter of subject matter jurisdiction. (Rather, the worker attempts to distinguish *Ward* as set forth above.) However, we shall not declare a lack of subject matter jurisdiction merely because the worker relied on other counter-arguments.

{¶49} "It is true that the issue of subject-matter jurisdiction can be challenged at any time and that a court's lack of subject-matter jurisdiction renders that court's judgment void ab initio." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11. However, the *Ward* Court never used the term "subject

matter jurisdiction." *Ward*, 106 Ohio St.3d 35. The Court mentioned how the appellate court found: "the trial court exceeded its jurisdiction by permitting the employee to amend his complaint to add these two conditions, which were never presented to the administrative body." *Id.* at ¶ 4. The Court also noted how this and other courts "view the order appealed as framing the jurisdiction of the common pleas court, finding that the claimant must first present all alleged conditions before the administrative body and that only the conditions adjudicated by the administrative order are properly before the court of common pleas." *Id.* at ¶ 8. Compared to the opposing view, the Court found these courts "come closer to the mark, although their reasoning requires some amplification." *Id.* at ¶ 9. The Court did not then speak of subject matter jurisdiction or a void judgment.

{¶50} "The general term 'jurisdiction' can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case." *Kuchta*, 141 Ohio St.3d 75 at ¶ 18. The latter category has been called the "third category of jurisdiction." *See, e.g., Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12. Jurisdiction is considered a "polysemic" word (of multiple meanings); its use in court opinions often leads "to confusion and has repeatedly required clarification as to which type of 'jurisdiction' is applicable in various legal analyses." *Id. See also Pratts*, 102 Ohio St.3d 81 at ¶ 33.

{¶51} "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases * * * A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case." *Id.* at ¶ 19. To the contrary, the parties' individual rights are to be considered when discussing the third category of jurisdiction. *Id.* As to this third category: "A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction." *Id.* "If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." *Id.*

{¶52} We conclude the holding in the *Ward* case (on which medical conditions can be tried on appeal to the common pleas court) did not announce a rule of subject matter jurisdiction. The Ohio Supreme Court did not express there was a lack of subject matter jurisdiction or declare the judgment void. The concept of whether a medical condition was properly before the trial court entails a discussion of the parties' individual rights and the circumstances of how the particular case proceeded through the administrative system. Consequently, the rule expressed in *Ward* would, at most, deal with the trial court's "jurisdiction over a particular case" as it "refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction." *See id.* at ¶ 19.

{¶53} Contrary to the employer's argument, subject matter jurisdiction is not implicated, and the trial court's judgment is not void. The employer forfeited the argument (about which medical conditions could be submitted to the jury) by allowing the case to proceed through trial without properly raising the matter. In accordance, the employer's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: CLOSING ARGUMENT

{¶54} The employer's second assignment of error provides:

"THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION THAT PLAINTIFF-APPELLEE'S COUNSEL'S STATEMENTS DURING CLOSING ARGUMENTS WERE PREJUDICIAL TO THE JURY'S DELIBERATIONS."

{¶55} The employer contends the jury verdict was influenced by passion and prejudice as the worker's attorney knowingly made false, misleading, and inflammatory statements during the rebuttal portion of his closing argument. The employer recognizes there is wide latitude in closing arguments but emphasizes one cannot misrepresent the evidence or go beyond the limits of propriety. The employer urges us to resolve any doubt (over whether the jury's verdict was influenced by the improper comments) in the losing party's favor. *Citing Warder, Bushnell & Glessner Co. v. Jacobs*, 58 Ohio St. 77, 85, 50 N.E. 97 (1898) ("If, on a consideration of the whole case, there is room for doubt whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt

should be resolved in favor of the defeated party."). The employer states that even if each individual issue raised infra does not warrant reversal for a new trial, the issues collectively resulted in unfair prejudice.

{¶56} "It is axiomatic that great latitude is afforded counsel in the presentation of closing argument to the jury." *Pang v. Minch*, 53 Ohio St.3d 186, 194, 559 N.E.2d 1313 (1990). The issue of whether the permissible bounds of closing argument have been exceeded is a discretionary function to be performed by the trial court which should not be reversed on appeal absent an abuse of discretion. *Id.* Closing arguments are not evidence, and it is generally presumed the jury followed the court's instructions as to this topic. *Id.* at 195.

{¶57} Contested remarks should not be viewed in isolation but are to be considered in the context of the entire closing argument. *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 464, 739 N.E.2d 749 (2001) (addressing prosecutorial misconduct in closing arguments). It has been observed that comments made in direct response to arguments advanced by opposing counsel are unlikely to constitute a ground for reversal. *Peffer v. Cleveland Clinic Found.,* 8th Dist. No. 94356, 2011-Ohio-450, ¶ 64. *See also State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996) (holding the defendant "can scarcely complain" where his counsel had previously and repeatedly used variations of the same language contested by the defendant).

{¶58} First, the employer complains the worker's attorney said the employer was aware of the worker's medical history, including a 2001 car accident. The employer says the worker's credibility was a key issue and her denial of certain aspects of her medical history during deposition was critical to the employer's case. For instance, during cross-examination of the worker, the employer pointed to her answers in two different interrogatories which failed to list the 2001 car accident (where lower back problems resulted); she listed three other accidents. (Tr. 149, 151). The employer also emphasized the worker's deposition testimony that her back was fine prior to the June 14, 2011 workplace incident. (Tr. 144-145, 186). This was reiterated in the employer's closing argument. (Tr. 539, 552).

{¶59} In rebuttal, the worker's attorney stated: "what are we hiding from the company? The company knew all along that this 2001 accident happened. The company knew all along --." (Tr. 553). The employer objected on the grounds that this comment was unsupported by evidence. (Tr. 553-554).

{¶60} The court instructed: "We don't know what the company knew. There was no testimony to that. And, ladies and gentlemen of the jury, again, closing arguments are not evidence. They are a summation of what they believe the evidence is. This is on rebuttal as to testimony. So you may continue." (Tr. 554). The employer characterizes the court's instruction as a partial curative instruction as the court did not instruct the jury to disregard the statement.

{¶61} The worker's attorney then noted the employer received the medical documents in discovery after the worker signed releases, adding:

> "So for them to suggest that she somehow was trying to lie to them in order to mislead them about what is going on in this case is just simply ludicrous. In fact, it makes me ill that [the employer's attorney] would get up there and even suggest that she would lie about that when they've had all these records all long, and he knows it. It really grinds me that he would suggest that." (Tr. 554-555).

{¶62} There was no objection, but counsel now states this was a personal attack on his integrity. This contested statement was made in rebuttal of allegations the worker misrepresented facts in the discovery stage of the case. It was a response to the employer's closing argument which urged the worker's misstatements in discovery were intentional lies. The worker notes on appeal how derogatory the employer's counsel was in closing, which set the tone for the rebuttal.

{¶63} The worker's attorney stated in the initial closing argument that the car accident was part of the employee's work records. (Tr. 512). Notably, the employer did not object to this statement. (Tr. 512). In addition, there was evidence the worker's physician issued a release for her return to work without restrictions in March 2003 (after he treated her for back pain due to the 2001 accident). (Tr. 309).

There was evidence the employer knew the employee dealt with sciatica "for years." For instance, the administrator of the facility (Mr. Fabian) wrote a note the day after her accident stating the worker told him about her history of "sciatica" and the resulting pain down her leg. (Tr. 152, 245-246, 467). In sum, the objected-to statements were not as inflammatory as the employer portrays them.

{¶64} Next, the employer takes issue with the portion of rebuttal suggesting the employer's expert, Dr. Gula, was a hired gun and could lie without consequence. The worker asks us to read her rebuttal in the context of the entire closing argument, including the employer's closing which set the tone of the rebuttal. In the employer's closing argument, counsel discounted the testimony of the worker's two physicians. He said her family doctor provided disingenuous statements and willful misrepresentations. (Tr. 550-551). He said the doctor's opinions were nearly all untruthful. (Tr. 549). In fact, he declared the doctor "has no integrity." (Tr. 552). He argued the only medical opinion with value was that of Dr. Gula and said the worker's case was "horsefeathers" (which the worker interprets as a euphemism for horse excrement). (Tr. 552).

{¶65} Counsel for the worker began rebuttal by noting the criticism directed at her physicians by the employer's attorney. He then noted Dr. Gula was hired by a firm, who provides independent contractor physicians for workers' compensation examinations, which firm was hired by the employer. The worker's counsel made reference to the amount of medical examinations the expert performed per week and the price per examination; he then estimated a yearly income from the two days a week the doctor spent performing medical examinations for the firm. (Tr. 552). The employer states the estimate was an exaggeration. Yet, no objection was made. And, the employer acknowledges the subject of financial interest of an expert witness is fair game and within the trial court's discretion to permit. *See, e.g., Calderon v. Sharkey*, 70 Ohio St.2d 218, 224, 436 N.E.2d 1008 (1982) (dealing with cross-examination).

{¶66} Next, the worker's counsel said the firm is "who you go to when you need an expert to testify that something is not related or that it's a degenerative

problem or something like that. We're supposed to believe him. But we're not supposed to believe her family doctor who's known her for 20, 30 years, and an orthopedic surgeon who was going to do surgery on her * * *." (Tr. 553).[4] The employer presents for our review the implication that Dr. Gula was a "hired gun." However, no objection was entered.

{¶67} Later, the worker's attorney said: "[Dr.Gula] can say whatever he wants because there is no physician-patient relationship between him and Liz Cosgrove, so there is no legal consequences to him saying whatever he says. He's not saying that to the Bureau under perjury penalty. He's just saying it to him and you. So he can say whatever he wants." (Tr. 558). At this point, the employer objected, saying this was a misrepresentation because the doctor testified under oath and thus under penalty of perjury. The court responded: "Note your objection. Again, these are closing arguments. Arguments of counsel are not evidence. That's their summation of what they believe the evidence to be." (Tr. 559).

{¶68} Part of the argument is true, such as the doctor did not file a statement with the BWC under penalty of perjury. Part of the argument may go too far by suggesting the employer's expert had no obligation to tell the truth at trial. However, read in context of the entire closing argument, and the entire case for that matter, inflammatory prejudice is not apparent. The employer pointed out the doctor was under oath, and the court pointed out that the statements made by the worker's attorney were not evidence. Any suggestion the employer's expert was not subject to the standard applicable to any testifying witness does not appear to be of such significance that doubt is raised as to whether the jury's verdict was inflamed by prejudice. This assignment of error is overruled.

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[4] As to the worker's doctors, counsel added: "both of whom who have testified under oath and both of whom have written to the Bureau of Workers' Compensation under criminal prosecution that this problem exists and that it's related to this accident." (Tr. 553). This statement was related to testimony concerning a sworn statement on the bottom of BWC forms that the physician is signing under penalty of perjury and criminal prosecution. (Tr. 480). The worker's initial closing argument noted her physician was careful in filling out the BWC forms and did not initially opine the injury was work related until the specialist saw her because he was signing the paperwork under penalty of criminal prosecution. (Tr. 523, 525).

ASSIGNMENT OF ERROR THREE: REASONABLENESS OF FEE

{¶69} The employer's final assignment of error provides:

"THE TRIAL COURT ERRED IN AWARDING THE FULL AMOUNT OF DR. MUSSER'S $5,000 EXPERT WITNESS FEE AS COSTS."

{¶70} After trial, the worker filed a motion for fees and costs with a memorandum in support. In pertinent part, the motion asked to recover $5,000 as Dr. Musser's expert witness fee. Dr. Musser was the orthopedic spine surgeon who evaluated the worker upon request of her family physician. He testified via deposition taken on June 12, 2015, which lasted 2.5 hours. Dr. Musser's bill was attached to the worker's motion. The bill, from Youngstown Orthopaedic Associates, referred to a fee agreement requiring $2,000 in advance for the first hour and $1,000 per half-hour thereafter, for a total of $5,000. The worker also provided a copy of the $2,000 check from the law firm of the worker's attorney, showing the advance payment for the deposition.

{¶71} The employer filed a memorandum in opposition. The employer agreed the expert witness fee for giving a deposition in a workers' compensation case was recoverable under R.C. 4123.512(F) and *Moore v. General Motors Corp.*, 18 Ohio St.3d 259, 480 N.E.2d 1101 (1985). The employer pointed out, however, that after the trial court determines the fee is directly related to the claimant's appeal, the court must determine *the reasonableness* of the fee. *See Schuller v. United States Steel Corp.*, 103 Ohio St.3d 157, 2004-Ohio-4753, 814 N.E.2d 857, applying R.C. 4123.512(F). The *Schuller* court remanded for the trial court to determine whether the $3,000 fee charged by the expert who testified live in 2002 was reasonable. *See Schuller*, 103 Ohio St.3d 157 at ¶ 14; *Schuller v. United States Steel Corp.*, 11th Dist. No. 2002-T-0165, 2003-Ohio-4870, ¶ 6, 16 (listing the expert's fee as $3,000).

{¶72} The employer noted Dr. Musser's deposition took place at his own office and Dr. Musser denied knowledge of the fee charged by his office when asked at deposition. The employer also claimed the deposition was lengthened due to off the record discussion by counsel and the other side's repeated objections. The employer concluded Dr. Musser's $5,000 fee was patently unreasonable. It was also

pointed out the worker's family doctor, Dr. Catterlin, charged only $500 for his testimony; the employer urged that although Dr. Musser is a specialist, this would not account for a fee that was ten times greater. (On this point, there was no reference to the length of Dr. Catterlin's deposition, which may have been shorter than that of Dr. Musser.)

{¶73} The worker filed a reply in the trial court. She pointed out Dr. Musser is a specialist in orthopedic medicine and surgery. He is an employee of Youngstown Orthopaedic Associates. It was said this is one of the largest orthopedic facilities in the tri-state area, employing physicians who are board certified or eligible in orthopedic surgery. The worker noted Dr. Musser's fee for the deposition was set by the practice for all physicians and was not controlled by him. A letter from Youngstown Orthopaedic Associates was attached showing the standard fee schedule and payment policy. The worker pointed out she was referred to this expert by her family physician and urged she should not have to inquire about potential deposition fees before seeking treatment.

{¶74} The trial court's February 4, 2016 judgment entry for costs stated the court considered the memoranda in support and against the motion as well as the oral arguments of counsel. The court found the $5,000 expert witness of Dr. Musser was "supported by the evidence as to the time expended and the per hour fee for said testimony" as shown by the worker's exhibits. The court concluded: "Said fee is reasonable and necessary for the preservation and presentation of the testimony of Douglas Musser, D.O., given the witness's expertise and qualifications."

{¶75} On appeal, the employer reiterates its arguments below and contends there was no evidence presented to show the fee was reasonable. The employer urges a fee is not reasonable merely because it is the expert's standard fee. It has been observed: "An expert's regular hourly rate for professional services is presumptively a reasonable hourly rate for deposition." *See, e.g., Bonar v. Romano*, S.D.Ohio No. 2:08-CV-560 (Oct. 25, 2010) (upholding a Pittsburgh forensic psychiatrist's $3,000 flat fee for a deposition after being presented with examples of other fees).

{¶76} However, they use other considerations as well, including: the area of expertise; the expert's skill and training; the complexity of the issue; and the prevailing market rate for those with comparable skill and experience within the venue of the court of record. *Anderson v. Jas Carriers, Inc.*, S.D.Ohio No. 1:12-CV-280 (Mar. 13, 2013). "The list of factors that may be relevant can vary from case to case." *Id.*

{¶77} The worker states the trial court did not abuse its discretion and there was evidence to support the fee. The worker points out the claimant had no choice but to secure the testimony of her treating orthopedic surgeon, noting he was a key witness. It is claimed the majority of the deposition was the employer's "endless cross examination" in attempting to discredit Dr. Musser. Although the employer raised a similar argument below (that it was the worker who unnecessarily increased the length of the deposition), the emphasis on appeal is not time spent but the amount charged per half-hour ($1,000).

{¶78} The trial court determined the fee was reasonable as required by *Schuller*. In response to the employer's claim there was no evidence showing the reasonableness of the fee, the worker asserts the fee schedule is in line with other specialists in this area. The employer says there was no evidence to support this statement. Yet, this orthopedic surgeon's fee was shown to be in line with the 10 other orthopedic surgeons listed on the letterhead for Youngstown Orthopaedic Associates and subject to the same standard fee schedule. The worker thus presented evidence that 11 local orthopedic surgeons charge this same amount. The employer did not respond with evidence as to what other local orthopedic surgeons charged for depositions in 2015 or what their own expert charged for his deposition.

{¶79} A hearing was apparently held on the fee request (as the court's entry says it considered oral arguments). Yet, the employer did not present evidence of fees charged by similar local surgical specialists. *See Duponty v. Kasamias*, 7th Dist. No. 06 MA 72, 2007-Ohio-5047, ¶ 82 ("neither this court nor the trial court have been enlightened on what the average orthopedic surgeon (one with a sub-specialty) charges to give expert testimony or what would be a reasonable fee in Ohio").

{¶80} Considering the evidence of the fee charged by 11 local orthopedic surgeons and the lack of opposing evidence showing lower fees charged by other comparable experts, we conclude the trial court did not abuse its discretion in adopting as reasonable the amount charged by Dr. Musser. This assignment of error lacks merit.

{¶81} In conclusion, Appellant's three assignments of error are overruled, and the trial court's judgment is affirmed.

Cannon, J., concurs.
The Eleventh District Court of Appeals,
Sitting by assignment.

Wright, J., concurs.
The Eleventh District Court of Appeals,
Sitting by assignment.