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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WHELAN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

NANCY A. MEYERS	:	
Plaintiff	:	CASE NO. 2016 CVD 01198
vs.	:	Judge McBride
OHIO BUREAU OF WORKERS' COMPENSATION, ET AL.	:	<u>DECISION/ENTRY</u>
Defendants	:	

Fox & Fox Co., L.P.A., Christopher Kneflin, counsel for the plaintiff Nancy A. Meyers, P.O. Box 207, Amelia, Ohio 45102.

Beirne & Wirthlin Co., L.P.A., J. Stephen Wirthlin, counsel for the defendant, James Annalee, Inc., Right at Home, 1745 Madison Road, Cincinnati, Ohio 45206.

Ohio Attorney General's Office, Workers' Compensation Section, Steven P. Fixler, counsel for the Ohio Bureau of Workers' Compensation, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202.

This cause is before the court for consideration of the plaintiff's motion for attorney fees and costs filed on August 10, 2018. The court held a hearing on the motion on September 21, 2018, at the conclusion of which the court took the issues raised in the motion under advisement.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTUAL AND PROCEDURAL BACKGROUND

The present case involves a denied workers' compensation claim. The plaintiff Nancy A. Meyers had allowances from the Bureau of Workers' Compensation to participate in the Workers' Compensation Fund for a right knee sprain and patellofemoral syndrome of the right knee. The plaintiff sought to amend her claim to include additional conditions of peroneal tendinitis of the right knee and for right patellofemoral joint chondromalacia in Claim No. 14-835442. The additional claims, however, were denied.

On August 26, 2016, the plaintiff filed a notice of appeal from two Hearing Officer Decisions dated July 12, 2016, which denied the above additional conditions. That same day, she filed a complaint asking to be found entitled to participate in the Workers' Compensation Fund and requested recovery of costs and statutory attorney fees.

On May 24, 2017, counsel for the defendant Administrator of the Ohio Bureau of Workers' Compensation (hereinafter referred to as "OBWC") emailed counsel for the employer indicating that OBWC and the plaintiff agreed to a settlement amount. However, the defendant-employer James Annalee, Inc. did not want to settle because, if it did so, it would have to pay higher workers' compensation premiums. OBWC indicated that it would not be an active participant in the case, but that the litigation would continue since the employer refused settlement. As such, OBWC stated that it expected the employer to be responsible for all litigation expenses, including but not limited to court costs, deposition fees, and attorney fees.

Counsel for OBWC sent a similar email to counsel for the employer again on June 5, 2017. This email also cited to R.C. 4123.512 as supporting OBWC's position on

attorney fees and costs, stating that it was now only the employer who was contesting the plaintiff's right to participate in the Workers Compensation Fund, not OBWC.

Counsel for OBWC informed the court that it was no longer defending the case at the final pretrial conference. This case was scheduled for trial on June 15, 2017. However, the plaintiff requested a continuance due to an illness unrelated to this case.

The court held a bench trial on November 30, 2017. At trial, the plaintiff testified. Both parties also submitted deposition testimony from their respective experts. At the outset of trial, counsel for the plaintiff indicated that the plaintiff would not move forward on the claim for peroneal tendonitis of the right knee, only right patellofemoral joint chondromalacia. The court issued a written decision on June 8, 2018 finding that the plaintiff be permitted to participate in the Ohio Workers' Compensation system for a claim of patellofemoral joint chondromalacia.

The plaintiff filed a motion to set attorney fees and order costs pursuant to R.C. 4123.512 on August 10, 2018. Under R.C. 4123.512(D) and (F), the plaintiff requests an attorney fee award of the statutory maximum of \$4,200, \$2,550 for the expert witness deposition fee of Dr. Lee, \$560 for Dr. Lee's stenographic deposition, and \$246 for the stenographic deposition of Dr. Rozen, plus court costs as established by the Clerk.

OBWC filed a response on August 24th. OBWC posits that the plaintiff's motion should be granted, and that the employer should pay these costs and the attorney fees. On September 4th, the employer filed a response as well. The employer, like OBWC, does not dispute that the plaintiff should receive the requested costs and attorney fees. However, the employer contends that OBWC should share it with the employer.

LEGAL ANALYSIS

This motion concerns R.C. 4123.512, which addresses “the reimbursability of certain claimants expenditures incurred in bringing workers’ compensation appeals.”¹ “[S]tatutes to reimburse plaintiffs who win workers’ compensation appeals are ‘designed to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund.’”² The “decision to grant or deny fees and costs under R.C. 4123.512(D) and (F) lies within the sound discretion of the trial court.”³

“R.C. 4123.512(D) concerns payment for physicians’ depositions filed with the court. No matter the outcome of the appeal, claimants are reimbursed for that cost.”⁴

R.C. 4123.512(D) provides, in relevant part:

“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.”⁵

Therefore, under R.C. 4123.215(D), “win or lose, a claimant may recover the costs of his own doctor’s deposition if the deposition is filed with the court. If the claimant loses,

¹ *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 186, 749 N.E.2d 267 (2001).

² *Id.*, quoting *Moore v. Gen. Motors Corp.*, 18 Ohio St.3d 259, 261–262, 480 N.E.2d 1101 (1985).

³ *Wasinski v. PECO II, Inc.*, 189 Ohio App.3d 550, 2010-Ohio-4293, 939 N.E.2d 883, ¶ 13 (3d Dist.), citing *Dixon v. Ford Motor Co.*, 8th Dist. No. 82148, 2003-Ohio-3959, 2003 WL 21710796, ¶ 5 (July 24, 2003).

⁴ *Kilgore*, 92 Ohio St.3d at 186. See *Wasinski*, 2010-Ohio-4293 at ¶ 14 (holding same).

⁵ (Emphasis added.) R.C. 4123.512(D) (2015). The Revised Code provision applicable to this case is a former version of R.C. 4123.512, which will be cited throughout instead of the present version.

the reimbursement comes from the Surplus Fund; if the claimant wins, reimbursement is charged against the party challenging the claimant's eligibility."⁶

Unlike R.C. 4123.215(D), R.C. 4123.215(F) "addresses a broader class of reimbursable costs that are payable to a claimant who is adjudged on appeal to be eligible to participate in the fund."⁷ R.C. 4123.215(F) is purposed "to protect a claimant who is forced to litigate an appeal."⁸ "When a claimant's right to participate in the workers' compensation fund is established on appeal, R.C. 4123.512(F) requires the trial court to award the claimant his or her costs."⁹ Specifically, R.C. 4123.512(F) provides:

"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."¹⁰

Therefore, "a prevailing claimant is entitled to recover statutory attorney fees from his or her employer where the employer contested the claimant's right to participate in the workers' compensation system and the claimant's right to participate is established upon the final determination of the appeal."¹¹ The "event that triggers the availability of reimbursement under R.C. 4123.512(F) is the establishment on appeal that a claimant

⁶ *Kilgore*, 92 Ohio St.3d at 186.

⁷ *Id.* at 187. See *Wasinski*, 2010-Ohio-4293 at ¶ 14 (holding same).

⁸ *Holmes v. Crawford Machine, Inc.*, 134 Ohio St.3d 303, 2012-Ohio-5380, 982 N.E.2d 643, ¶ 7.

⁹ *Holmes*, 2012-Ohio-5380 at the syllabus.

¹⁰ (Emphasis added.) R.C. 4123.512(F).

¹¹ *Cakic v. Ridge Pleasant Valley, Inc.*, 8th Dist. Cuyahoga No. 102278, 2015-Ohio-2523, ¶ 13. See *Powers*, 103 Ohio App.3d at 273 ("the cost of any legal proceedings authorized by this section is to be taxed against the employer if it disputes the right of the ultimately successful claimant to participate in the fund.").

has the right to participate or continue to participate in the fund."¹² And an award under R.C. 4123.215(F) is mandatory.¹³

To determine the costs award, the trial court must "use 'the effort expended' as the criterion for setting the amount."¹⁴ Moreover, "[u]nder R.C. 4123.512, reasonable expenses are those 'bearing a direct relation to a claimant's appeal that lawyers traditionally charge to clients.'"¹⁵ However, the "trial court is not required to apportion costs based on the outcome of a particular claim and/or condition."¹⁶

There is virtually no case law involving the precise issue involved in this case, which is whether OBWC or employer should pay costs and attorney fees under R.C. 4123.512 when both parties initially disputed the plaintiff's claim at the outset of the appeal. However, the case of *Hart v. Clow Water Systems/McWayne, Inc.*, 5th Dist. Coshocton No. 01-CA-004, 2001 WL 1913869 (Nov. 30, 2001), is instructive. In *Hart*, the claimant filed two separate appeals on two cases at the trial court.¹⁷ Both cases were consolidated for trial, and the jury granted the claimant the right to participate in the Workers' Compensation Fund for one case but not the other.

One of the issues on appeal was the court's determination of attorney fees and costs and the responsibility for payment thereof.¹⁸ The Attorney General had filed an

¹² *Holmes*, 2012-Ohio-5380 at ¶ 9.

¹³ *Cakic v. Ridge Pleasant Valley, Inc.*, 8th Dist. Cuyahoga No. 102278, 2015-Ohio-2523, ¶ 11, citing *Hairston v. Baltimore Ravens, Inc.*, 8th Dist. Cuyahoga No. 91339, 2008-Ohio-5341, ¶ 22. See *Powers v. N. Royalton*, 103 Ohio App.3d 269, 273, 659 N.E.2d 338 (8th Dist. 1995) (holding same).

¹⁴ *Holmes*, 2012-Ohio-5380 at ¶ 1.

¹⁵ *Id.* at ¶ 13.

¹⁶ *Id.* at the syllabus.

¹⁷ *Hart v. Clow Water Sys./McWayne, Inc.*, 5th Dist. Coshocton No. 01-CA-004, 2001 WL 1913869 (Nov. 30, 2001).

¹⁸ *Id.* at *7.

answer in both cases contesting the right of the claimant to participate in the fund.¹⁹ However, it did not participate at trial.²⁰ As to the payment for depositions under R.C. 4123.512(D), the trial court found that both the employer and claimant were unsuccessful parties, since the claimant won in one case and lost in the other.²¹ With respect to attorney fees under R.C. 4123.512(F), the court ordered that attorney fees shall be paid from the Workers Compensation Fund, in other words, making OBWC pay for attorney fees.²²

OBWC appealed on that issue.²³ On appeal, the Fifth District Court of Appeals did not disturb the trial court's determination that, for R.C. 4123.512(D) purposes, the employer was the "unsuccessful party" in the case it lost, and that the plaintiff was the "unsuccessful party" in the case it lost. However, it did find that the trial court erred in ordering OBWC to pay attorney fees under R.C. 4123.512(F).²⁴ The court held as follows: "[I]t is clear that we must agree with the Assignment of Error propounded by the Appellant, Administrator of the Bureau of Worker's Compensation, and determine that the mere filing of Answers did not, in the case *sub judice* constitute contesting the claims under the statute since the self insured employer (Clow) carried the defensive position through trial as to each case."²⁵

And thus, OBWC was determined to not be responsible for the payment of attorney fees under R.C. 4123.512(F).²⁶

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id. at *8.

²⁵ Id.

²⁶ Id. at *9.

In examining the present case, the court must first determine who the “unsuccessful party” was for purposes of R.C. 4123.512(D), which allows for payment for physicians’ stenographic depositions filed with the court. Since the plaintiff won her appeal, she is clearly not the unsuccessful party, and thus OBWC is not required to pay for the depositions from the surplus fund. And since OBWC did not participate at all in the trial, the unsuccessful party is the employer in this case. Therefore, the court charges the costs of Dr. Lee and Dr. Rozen’s stenographic depositions against the employer, pursuant to R.C. 4123.512(D).

Next, the court must examine R.C. 4123.512(F) to determine the costs of these legal proceedings, including attorney fees, as well as which party to tax them against. There is no dispute that the plaintiff’s appeal to the common pleas court was a legal proceeding authorized under R.C. 4123.512, that the employer contested her right to participate in the workers’ compensation for the conditions at issue, and that the plaintiff’s right to participate in the fund for the condition of patellofemoral joint chondromalacia was established upon the final determination of her appeal. Therefore, the plaintiff is eligible to receive an award of statutory attorney fees and costs under R.C. 4123.512(F).

It is also undisputed that the plaintiff should receive an award of the costs and attorney fees she requested, those being the expert deposition witness fee for Dr. Lee, attorney fees of the statutory maximum of \$4,200, and court costs, as determined by the Clerk. The court finds these expenses reasonable. Furthermore, based on the plaintiff’s description of the efforts her counsel expended in this case, which actually exceeded \$4,200, an award of the statutory maximum is appropriate.

The only remaining issue is, as with the stenographic deposition costs, whether OBWC or the employer is to pay. The *Hart* case is persuasive here, and the court finds that the employer should be taxed with costs and attorney fees. Although OBWC did contest the right of the plaintiff to participate in the Workers Compensation Fund in its answer, it did not participate in trial. In fact, it had a tentative settlement agreement with the plaintiff. However, because the employer did not wish to settle the claim, OBWC did not force the settlement.²⁷ And, in emails to counsel for the employer, OBWC indicated that it was not going to be an active participant in the litigation, it no longer contested the plaintiff's right to participate in the fund, and it expected the employer to be responsible for all costs and attorney fees. Thus, OBWC no longer actively contested the right of the plaintiff to participate in the fund, but the employer still pressed on with the trial because it did contest the plaintiff's right to participate.

Although the court understands the employer's argument that equity would be best served by having fees and costs be split between it and OBWC, the court has not found any case law supporting that position. As such, the court taxes the attorney fees and costs against the employer.

²⁷ "[G]enerally, [OBWC] has the authority to settle a workers' compensation claim, even if the employer does not agree." *Smith v. Kaleal*, 11th Dist. Lake No. 2007-L-083, 2007-Ohio-6560, ¶ 19, quoting *Turner v. Chagrin Plastic Methods*, 11th Dist. No. 89-L-13-001, 1989 Ohio App. LEXIS 4461, 10, 1989 WL 146428 (Dec. 1, 1989).

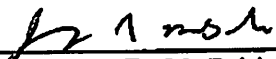
CONCLUSION

Based on the analysis and findings above, the court hereby finds that the plaintiff Nancy A. Meyer's motion is granted. The court taxes the defendant-employer James Annalee, Inc. with costs and attorney fees pursuant to R.C. 4123.512.

The court awards a reasonable attorney fee of \$4,200 to the plaintiff's counsel, as well as \$2,550 for the expert witness deposition fee of Dr. Lee, \$560 for Dr. Lee's stenographic deposition, \$246 for Dr. Rozen's stenographic deposition, and court costs as determined by the Clerk of this court.

IT IS SO ORDERED.

DATED: 5-17-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 17th day of May 2019 by e-mail to Chris Kneflin, at chris@foxfoxlaw.com, Attorney for the Plaintiff, to Stephen P. Fixler, at stephen.fixler@ohioattorneygeneral.gov, Attorney for the Defendant Administrator, and to J. Stephen Wirthlin, Attorney for the Defendant James Annalee, Inc., at swirthlin@fuse.net.



Judicial Assistant to Judge McBride