[Cite as *Robinson v. Conrad, Admr.*, 2003-Ohio-2961.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

WILLIAM J. ROBINSON	:	
Plaintiff-Appellant	:	C.A. CASE NO. 1604
v.	:	T.C. CASE NO. 01 CV 59128
C. JAMES CONRAD, ADMINISTRATOR, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	
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O P I N I O N

Rendered on the 6th day of June, 2003.

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FREDERICK N. YOUNG, J.

{¶1} Plaintiff-Appellant William J. Robinson is appealing the decision of the Common Pleas Court of Darke County, Ohio, which denied his motion for reconsideration of the assessment of certain costs incurred during his successful pursuit of a workers' compensation claim.

{¶2} The facts of the case are not in dispute. On March 3, 1998, Robinson contracted an occupational disease while in the course of and arising out of his employment with Whirlpool Corporation. Robinson filed a claim with the Bureau of Workers' Compensation for "bilateral carpal tunnel syndrome." Compensation and benefits were paid.

{¶3} Thereafter, on February 11, 2000, Robinson filed a motion to request the additional claim of "bilateral cubital tunnel syndrome." On March 31, 2000, a district hearing officer for the Ohio Industrial Commission ("OIC") issued a decision denying Robinson's motion. The officer found that the new condition was "not causally related to and/or the result of the claimant's industrial injury of 3-3-98 per the report(s) of Dr(s). Koppenhoefer dated 1-11-2000 and 3-28-2000 who opined that none of the claimant's jobs with the instant employer had the critical elements to cause BILATERAL CUBITAL TUNNEL SYNDROME."

{¶4} Robinson appealed the ruling to a staff hearing officer, who issued a decision on August 11, 2000 denying the appeal. Robinson appealed to the OIC; the OIC refused the appeal.

{¶5} As a result of the August 11, 2000 and September 16, 2000 decisions, Robinson appealed to the Darke County Common Pleas Court pursuant to R.C. 4123.512. Following a jury trial, the trial court entered a judgment in favor of Robinson's

right to participate in the Workers' Compensation Act of Ohio for the additional condition of bilateral cubital tunnel syndrome. Whirlpool did not file an appeal.

{¶6} On September 10, 2002, a proposed amended judgment entry was sent by Robinson to Whirlpool requesting consent to statutory costs and fees. Specifically, Robinson requested reimbursement for stenographic and video deposition costs of his expert witness, Dr. Douglas Gordon, reimbursement for the expert fee associated with his deposition, and the transcription costs from the deposition of Whirlpool's expert Dr. Koeppenhoeffer.

{¶7} Robinson filed a memorandum in support of costs and fees on October 4, 2002. He asserted that the expert witness fee for preparing and giving a deposition is reimbursable and that the stenographic and reproduction deposition costs are to be charged against the non-prevailing party. Furthermore, Robinson relied on *Cave v. Conrad*, 94 Ohio St.3d 299, 2002-Ohio-793, 762 N.E.2d 991, in asserting that videotaped deposition expenses are also to be taxed against the non-prevailing party as costs.

{¶8} Whirlpool responded to the memorandum, relying on this court's decision in *George v. Administrator, Ohio Bureau of Workers' Compensation* (1997), 120 Ohio App.3d 106, 696 N.E.2d 1101, that either stenographic or videographic expenses can be taxed as costs, but not both.

{¶9} The trial court issued its decision on November 4, 2002, ordering that Whirlpool "pay the following costs and fees: ***The costs of either the videographic costs for Plaintiff's physicians or stenographic costs for Plaintiff's physicians." Robinson filed a motion for reconsideration; however, the trial court denied his motion. The trial

court stated that under *Cave*, supra, it was not required to tax both stenographic and videographic expenses as costs. The entry also denied Robinson's request to tax the costs of Dr. Gordon's fee and Robinson's request for reimbursement of the stenographic costs from Dr. Koeppenhoeffer's deposition.

{¶10} Robinson appeals that decision, asserting one assignment of error:

{¶11} "The trial court committed prejudicial error and abused its discretion by refusing to assess costs against the non-prevailing party in a workers' compensation case as mandated by Ohio Revised Code §4123.512 and authorized by Supreme Court authority."

{¶12} Robinson asserts that under *Cave*, supra, the trial court should have found that he was entitled to recover both the stenographic and the videographic expenses of Dr. Gordon's deposition. Under *Cave*, a claimant may recover "reasonable videotaped deposition expenses" pursuant to R.C. 4123.512(F). According to Robinson, this decision overruled *George*, supra, in which this Court held that either the stenographic or the videographic expenses of such deposition may be recoverable to the claimant, but not both.

{¶13} The procedure in cases of injury or occupational disease whereby a claimant may appeal an order of the OIC or an order of a staff hearing officer from which the OIC has refused to hear an appeal is found in R.C. 4123.512. Specifically, R.C. 4123.512(D) and (F) govern a claimant's recovery of costs of an appeal.

{¶14} R.C. 4123.512(D) provides, in pertinent part:

{¶15} "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."

{¶16} Taxing of costs incurred by a successful claimant are also permitted by R.C. 4123.512(F), which provides:

{¶17} "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."

{¶18} Not every expense is a recoverable cost under R.C. 4123.512(D). *State ex rel. Williams v. Colasurd* (1995), 71 Ohio St.3d 642, 646 N.E.2d 830, 1995-Ohio-236. Instead, "'costs' are not synonymous with expenses unless expressly made so by statute." (Citations omitted.) Id. at 643.

{¶19} In *George*, supra, this court addressed the issue of a claimant who had prevailed in an appeal to the trial court and who wished to recover both the stenographic and the videographic expenses of an expert medical witness. Based upon *Colasurd*, we found in *George* that "the recovery of the costs of taking a videotaped deposition of a physician is a special case covered specifically by R.C. 4123.512(D)." Even though the cost of preparing a transcript was an expense required by local rules, it was not necessarily a recoverable "cost" under the statute. Additionally, George was not legally required to submit a videotape of the deposition and he could have simply

offered a transcript of the deposition. Accordingly, we held that, because not every expense is recoverable, George could recover either the stenographic or the videographic expenses, but not both.

{¶20} Just recently, in *Cave*, supra, the Ohio supreme court reviewed a trial court's taxing as costs certain expenses for videotaping the depositions of expert medical witnesses. Unlike *George*, where the claimant had incurred stenographic and videographic expenses from the deposition, Cave had incurred expenses only for videotaping the depositions of two physicians. The court found that reasonable deposition expenses "may be" taxed as costs and awarded to a claimant.

{¶21} We do not find that the decision in *Cave* overrules what we stated in *George*, as no where in *Cave* does the court hold that both stenographic and videographic expenses of depositions must be taxed as costs.

{¶22} In this case, as in *George*, Robinson is seeking reimbursement for stenographic and videographic expenses associated with the deposition of Dr. Gordon. As in *George*, Robinson was not required to incur both stenographic and videographic costs for the deposition of Dr. Gordon. Contrary to what Robinson would like to believe, this is not a situation similar to that in *Cave* where the claimant is seeking reimbursement for videographic expenses only. Because there is no law mandating reimbursement for both stenographic and videographic costs of depositions, we must overrule Robinson's claims. As such, we find that the trial court did not abuse its discretion in finding that either the stenographic or the videographic expenses could be taxed as costs, but not both.

{¶23} Additionally, Robinson contends that the stenographic deposition

expenses of Whirlpool's expert, Dr. Koeppenhoeffer should be taxed as costs and that Whirlpool should be made responsible for their payment. We disagree.

{¶24} As the trial court noted: "While it may be wise for Plaintiff's counsel to review the deposition and to have a copy available for trial preparation purposes, this was a perpetuation deposition of a defense witness. The Court finds that Plaintiff was not required to obtain a copy of the deposition since the original was to be filed. Dr. Koppenhoeffer was the Defendant's doctor in this matter and the Defendants {sic} should be responsible to pay only for necessary costs; the cost of a copy for the convenience of Plaintiff's counsel is not a necessary expense. The Court does not find any reason to tax as costs the stenographic deposition expense for a copy to be made available for Plaintiff's counsel's use."

{¶25} We find no abuse of discretion in the trial court's reasoning. The cost incurred was for the convenience of Robinson and was not a necessary expense. We must therefore overrule Robinson's claim.

{¶26} Finally, Robinson asserts that the trial court erred in not assessing the costs of his expert, Dr. Gordon, as a cost for Whirlpool to pay. The trial court discretionarily denied Robinson's request, stating that Robinson twice had requested reimbursement of these fees and twice had failed to provide a copy of the fees statement involved. Based upon the lack of facts to make a decision, the trial court overruled his request.

{¶27} R.C. 4123.512(D) authorizes payment of deposition expenses incurred by a claimant to secure the testimony of a physician. The claimant is entitled to reimbursement whether she is successful or unsuccessful in prosecuting her appeal.

Akers v. Serv-A-Portion, Inc. (1987), 31 Ohio St.3d 78, 508 N.E.2d 964; *Sturgill v. Elder Beerman, Corp.*, Greene App. No. 02CA0062, 2003-Ohio-52, ¶8. R.C. 4123.512(F) authorizes a trial court to tax the fee and travel expenses charged by an expert witness as a cost that is then awarded to a successful claimant. *Sturgill*, supra, at ¶11, citing *Kilgore v. Chrysler Corp.*, 92 Ohio St.3d 184, 2001-Ohio-166, 749 N.E.2d 267. R.C. 4123.513(F) was enacted to "'minimize the actual expenses incurred by an injured employee who establishes his or her right to participate in the fund.'" *Id.* at ¶12, quoting *Moore v. General Motors Corp.* (1985), 18 Ohio St.3d 259, 261-262, 480 N.E.2d 1101.

{¶28} As we stated in *Sturgill*, supra, at ¶14, "the cost of 'live testimony' by an expert witness, including fees and travel expenses ***, may be taxed as costs pursuant to R.C. 4123.512(F), upon motion properly presented. The trial court may nevertheless decline to order payment of any part of such costs which it finds unreasonable. The burden to show unreasonableness is on the employer or commission against which the cost would be taxed."

{¶29} We cannot find that the trial court abused its discretion in failing to award those expenses as costs, as Robinson failed to properly present his motion and provide the necessary facts to the trial court upon which it could base its decision. Accordingly, we overrule this argument.

{¶30} Based upon the foregoing discussion, we overrule Robinson's assignment of error.

{¶31} The judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Jonathan P. Hein