

[Cite as *Lloyd v. Cleveland Clinic Found.*, 2011-Ohio-1573.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95363

HOWARD LLOYD

PLAINTIFF-APPELLANT

vs.

CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686845

BEFORE: Sweeney, P.J., Cooney, J., and Rocco, J.

RELEASED AND JOURNALIZED: March 31, 2011

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JAMES J. SWEENEY, P.J.:

{¶ 1} Appellant Howard Lloyd appeals from the trial court’s decision that denied his motion for costs and attorneys fees under R.C. 4123.512(F) following a jury verdict that found he was not entitled to participate in the workers’ compensation fund for the condition of reflex sympathetic dystrophy left upper extremity. We affirm.

{¶ 2} Appellant presents the following assignment of error:

{¶ 3} “The Trial Court Erred By Denying Plaintiff-Appellant’s Motion for Attorneys’ Fees and Litigation Expenses per R.C. 4123.512.”

{¶ 4} Appellant’s employer, the Cleveland Clinic, appealed from the administrative decision that allowed appellant to participate in the Ohio Workers’ Compensation fund. The jury found that appellant was not entitled to participate in the fund.¹ Despite the jury determination that appellant was not entitled to participate in the fund, appellant moved the trial court for costs and attorney’s fees pursuant to R.C. 4123.512(F), which provides:

{¶ 5} “(F) The cost of any legal proceedings authorized by this section, including an attorney’s fee to the claimant’s attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant’s right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the

¹This court recently affirmed that judgment in *Lloyd v. Cleveland Clinic Found.*, Cuyahoga App. No. 94957, 2011-Ohio-826.

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."

{¶ 6} The trial court held a hearing on this motion, where appellant argued, as he does on appeal, that he was entitled to fees regardless of the outcome of the appeal. Stated differently, it is appellant's belief that a claimant is entitled to recover litigation costs and attorney's fees whenever an employer pursues an appeal challenging an employee's right to participate in the workers' compensation fund, even if the appeal is resolved in the employer's favor. Appellant bases this interpretation on the language that provides that the right to participate "is established upon the final determination of an appeal" and suggests this interpretation is supported by the amendments to the statute that took effect in 2006.

{¶ 7} While it is true that the statute was amended in 2006, the subject language upon which appellant relies remains unaltered from the prior version of the statute.² This court has interpreted the applicable language to mean that "*where the claimant is victorious*, costs shall be taxed against the employer if the employer contested the claimant's rights to benefits, but costs will be taxed against the Industrial Commission if the Industrial

²In fact, the only substantive change to R.C. 4123.512(F) pertains to the maximum amount of attorneys fees allowed from \$2,500 to \$4,200.

Commission or administrator contested the claimant's right to benefits.” (Emphasis added.) *Alford v. Republic Steel Corp.* (1983), 12 Ohio App.3d 145, 146, 467 N.E.2d 567; see, also, *Powers v. N. Royalton* (1995), 103 Ohio App.3d 269, 273, 659 N.E.2d 338 (“Taxing costs to employers who contest claims ultimately determined to be valid is a procedure rationally related to the state’s interest in seeing those injured employees compensated,” quoting *Sorci v. Gen. Motors Corp.* (1983), 13 Ohio App.3d 223, 468 N.E.2d 916).

{¶ 8} Because appellant was not successful, he was not entitled to costs and attorney’s fees under R.C. 4123.512(F). To the extent that R.C. 4123.512(D) entitles appellant to reimbursement of certain specified expenses, he did not move for an award under this provision; a fact that the Bureau of Workers’ Compensation argued to the court below. Accordingly, because appellant moved for costs pursuant to subsection (F) rather than subsection (D), the trial court did not err in denying the request.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
KENNETH A. ROCCO, J., CONCUR