

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: When some, but not all, of the requested conditions are denied in a court appeal, what is the impact on costs and attorney's fees?**

A claimant who successfully defends a right to participate in common pleas court is entitled to be reimbursed for reasonable costs and attorney's fees incurred. *R.C. §4123.512(F)*. Reimbursement is subject to the discretion of the trial court, and is to be based upon the "reasonable necessity" of the attorneys fees (capped at \$4,200) and costs (costs for records, deposition transcripts, expert fees, etc.). *Kilgore v. Chrysler Corp*, 92 Ohio St.3d 184, 749 N.E. 2d 267 (2001). But what about when one or more conditions requested in a claim are denied at trial? Is a claimant entitled to costs and attorney's fees for conditions that were unsuccessful?

The Supreme Court of Ohio was presented with this issue in *Holmes v. Crawford Machine, Inc.*, 134 Ohio St.3d 303, 2012-Ohio-5380, which concerned a claimant who alleged multiple injuries as a result of an electrical shock. The claimant sought to have the claim allowed for six (6) conditions, including "left shoulder strain, electrical shock, low back strain, left rotator cuff tear, left shoulder dislocation, and abrasion right-fifth finger." After an SHO allowed the claim, the employer appealed to common pleas court pursuant to R.C. §4123.512, and the matter proceeded to trial. The jury rejected all of the requested conditions except "abrasion right-fifth finger," and found the claimant entitled to participate for that condition. The claimant moved to recoup her costs and attorney's fees pursuant to *R.C. 4123.512(F)*, and the employer opposed the motion, arguing that the vast majority of the costs and fees were unrelated to the abrasion. The trial court disagreed, granting the claimant \$4,200 in attorney fees and \$7,551.23 in costs. The employer appealed, and the Third District reversed the award, but certified a conflict with the Tenth District on this issue, prompting an appeal to the Supreme Court of Ohio.

The Supreme Court reversed, finding that the fees and costs were due and payable. The Court rejected the employer's argument that the costs and fees should be apportioned by the claims allowed, finding that they should be based upon the "effort expended." The Court concluded that the costs and attorney's fees were actually expended, that the intent of the statute is to limit appeals as a result of reasonable litigation expenses, and the statute only addresses the "right to participate" and not individual conditions. Therefore, the trial court did not abuse its discretion. In a firmly-worded dissent, Justice O'Donnell argued that employers should not be required to pay fees and costs associated with unsuccessful claims, and that the only "allowed" condition in this claim was "treated on site, with a bandage."

The facts of *Holmes* are extreme, but reinforce a truism in workers' compensation appeals: When it comes to costs and attorney's fees, appeals are a "zero sum" game. A loss of one condition is effectively a loss of all. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)