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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When pursuing an award of attorneys fees in a successful R.C. 4123.512 appeal, how much documentation must a claimant's attorney provide to demonstrate the amount owed?

When a claimant is successful in prosecuting an administrative appeal to the court of common pleas pursuant to R.C. 4123.512, they are entitled to request that attorney fees and expenses be paid by the BWC or the self-injured employer. *See R.C. 4123.512(F)*. This rule requires a "final determination" – e.g. a verdict, judgment, or withdrawal of an appeal by the employer or BWC. These attorney fees, which are capped at \$4,200, are to be requested at the end of the case, and serve to ensure that the claimant is not punished financially for securing a claim allowance to which he is entitled. Recently, the Ohio Court of Appeals, Eighth Appellate District, considered a case where an attorney's request for fees, made more than a year after the dismissal of the case, was denied, and whether the trial court was within its discretion to completely deny this request or was required to reduce the request to a reasonable amount.

Smith v. Franciscan Communities, Inc., 2014-Ohio-5291, involved a claimant who was injured at work in 2010, and filed a workers' compensation claim. The claim was initially allowed, but the employer later contested a request for additional allowance for a herniated disk, and ultimately filed an appeal to the common pleas court pursuant to R.C. 4123.512. After discovery was conducted, and less than a week before trial, the employer elected to withdraw its appeal and moved for dismissal. The trial court granted the dismissal without prejudice. Approximately a year and a half later, the attorney for the claimant filed a "bare bones" motion for attorney fees under R.C. 4123.512(F). The motion did not request a hearing, and was not accompanied by documentation of the amount of time spent on the case, the attorney's hourly rate, and the costs incurred for trial. The employer opposed the motion, and the trial court denied the motion for fees in its entirety, prompting an appeal as of right to the Eighth District Court of Appeals.

The Eighth District affirmed, concluding that the complete denial of the request was not an abuse of discretion. An "abuse of discretion" applies to actions which are "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217. In the case at bar, those terms could not be applied to the court's actions in light of the motion presented. R.C. 4123.512(F) permits fees upon the final determination of the appeal, but the request must be supported by the record. *Rubensbauer v. C.W. Zumbiel Co.*, 2013-Ohio-929. The attorney in *Smith* made the request more than a year and half after the determination of the appeal, and did not request a hearing. There was no documentation of the amount of time expended, the hourly rate, or the costs incurred. Had the claimant done any one of these things, there may have been a basis for alleging that some award was required, but because the request was done in a summary fashion, the trial court was entitled to dismiss it.

Smith is notable for two reasons. First, it again illustrates the danger of perfunctory appeals of orders by self-insured employers, who are bound by the same attorney's fees provision as the BWC. In most cases, it would not be difficult for an attorney to document hourly expenses that

equal or exceed the statutory cap. Second, attorneys for the injured worker must do more than simply ask for money – they must document their expenditures and time spent on the file. It has been my experience that many Plaintiffs attorneys will document a file with time spent, it will also include an hourly rate that is often several times average rates. In those cases, a hearing, and perhaps even testimony regarding whether anyone has actually paid the hourly rate dictated by the attorney, should be contemplated.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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