

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

WALTER YOUNG

C.A. No. 09CA009534

Appellant

v.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 07CV152252

LORAIN COUNTY PRINTING &
PUBLISHING, ET AL.

Appellee

DECISION AND JOURNAL ENTRY

Dated: August 17, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Walter Young was injured while working for Lorain County Printing and Publishing. He filed a claim with the Ohio Bureau of Workers’ Compensation, which allowed him temporary total disability compensation. County Printing appealed the allowance of the claim to the common pleas court, but later dismissed its appeal with prejudice. After the dismissal, Mr. Young moved for attorney’s fees and costs under Section 4123.51.2(F) of the Ohio Revised Code. The court denied his motion, however, concluding that he could not recover under that section because it had not made “a final determination of [his] right to continue participating in the workers compensation fund.” Mr. Young has appealed, assigning as error that the court incorrectly denied his motion for fees and costs. Because County Printing’s dismissal with prejudice was a final determination of Mr. Young’s right to continue to participate in the fund, this Court reverses.

FINAL DETERMINATION

{¶2} Section 4123.51.2(A) of the Ohio Revised Code provides that either party may appeal the Bureau of Workers' Compensation's final decision to the common pleas court. Section 4123.51.2(F) allows a claimant to recover his costs and attorney's fees for the appeal from his employer "in the event [his] right to participate or to continue to participate in the fund is established upon the final determination of an appeal" The purpose of subsection (F) is to prevent a claimant's recovery from being "dissipated by reasonable litigation expenses connected with the preparation and presentation of an appeal" *Moore v. Gen. Motors Corp.*, 18 Ohio St. 3d 259, 262 (1985) (construing predecessor to Section 4123.51.2(F)).

{¶3} The common pleas court denied Mr. Taylor's motion because it concluded that, since County Printing dismissed the appeal, the court had not made a final determination of Mr. Taylor's right to continue participating in the workers' compensation fund. The court's reading of the statute, however, was incorrect.

{¶4} To recover under Section 4123.51.2(F), Mr. Young had to show that, upon final determination of County Printing's appeal, he had the right to continue to participate in the worker's compensation fund. While a decision by the common pleas court in his favor would have finally determined the appeal, so did County Printing's dismissal with prejudice. As other districts have concluded, "[t]he effect of the dismissal of the appeal from the common pleas court was that [Mr. Young] was assured that [he] would continue to receive workers' compensation. Accordingly, [he] did prevail in the appeal" *Ramirez v. Toledo Stamping & Mfg. Co.*, 114 Ohio App. 3d 12, 15 (1996); *Painter v. Midland Steel Prods. Co.*, 65 Ohio App. 3d 273, 279 (1989) ("the voluntary dismissal of [Midland's] appeal finally determined that [Mr. Painter] was entitled to participate in the . . . Fund."); *Campbell v. Big Bear Stores Inc.*, 12th Dist. No. CA96-

07-066, 1996 WL 679685 at *1 (Nov. 25, 1996) (“[a] ‘final determination of an appeal’ which establishes a claimant’s right to appeal and mandates an award for an attorney’s fee includes an employer’s voluntary dismissal of an appeal”). The common pleas court incorrectly concluded that there could not be a final determination of the appeal unless it made a decision regarding Mr. Young’s right to continue participating in the workers’ compensation fund.

{¶5} County Printing has argued that Mr. Young’s assignment of error should be overruled because he forfeited his right to assert that the dismissal with prejudice was a final determination of the appeal. In his motion for attorney’s fees and costs, Mr. Young noted that, because County Printing dismissed its appeal, his “claim remains allowed.” He provided the text of Section 4123.51.2(F) and argued that “[r]easonable litigation costs and attorneys’ fees are awardable because as a result of [County Printing’s] appeal, [he] was ‘successful’, i.e. his claim remains allowed for the conditions appealed by [County Printing].” He also argued that “[f]ees and expenses are . . . awardable based upon ‘right to participate’ which has been established.” In his reply to County Printing’s opposition brief, Mr. Young cited *Moore v. Gen. Motors Corp.*, 18 Ohio St. 3d 259, 262 (1985), in which the Supreme Court upheld the common pleas court’s award of costs and fees, even though General Motors dismissed its appeal three days before trial. Accordingly, this Court concludes that Mr. Young did not forfeit any arguments regarding whether he is entitled to recover under Section 4123.51.2(F). His assignment of error is sustained.

CONCLUSION

{¶6} The common pleas court incorrectly concluded that Mr. Young could not recover his attorney’s fees and costs under Section 4123.51.2(F) because County Printing dismissed its appeal. The judgment of the Lorain County Common Pleas Court is reversed, and this cause is

remanded for a determination of the amount of fees and costs that Mr. Young may recover under that section.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CARR, J.
CONCUR

APPEARANCES:

FRANK G. BOLMEYER, attorney at law, for appellant.

R. MARK GOTTFRIED, attorney at law, for appellee.

SANDRA LISOWSKI, assistant attorney general, for appellee Bureau of Workers' Compensation.