IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 17A-2

WCC No. 9211-6631R1

THOMAS R. BROEKER

Petitioner

vs.

GREAT FALLS COCA-COLA BOTTLING COMPANY

Respondent/Insurer for

STATE COMPENSATION INSURANCE FUND

Employer.

ORDER AWARDING COSTS

This Court's determination awarding petitioner/claimant additional benefits was affirmed on appeal in *Broeker v. Great Falls Coca-Cola,* 275 Mont. 502, 914 P.2d 967 (1996). Following remand claimant submitted a memorandum of costs in the total amount of $1,298.93. The costs were itemized as follows:

Jack Stevens, CPA (consultation fee)	762.50
Deposition of Jim Capp	197.80
Appeal Fee	75.00
Copies of Supreme Court Brief	71.30
Copies of Supreme Court Brief	52.50
Transcript of Proceedings (9/20/96)	139.83
Total	**$1,298.93**

Respondent objects to all costs except the deposition of Jim Capp.

In *Kloepfer v. Bechtel Constr. Co.*, 272 Mont. 78, 899 P.2d 1081 (1995), the Supreme Court determined that costs which may be awarded to a claimant in connection with a petition to the Workers' Compensation Court are not limited to the statutory costs allowed in district

court actions. Subsequent to that decision, this Court amended its rule concerning costs. As amended, the rule provides:

> 24.5.342 TAXATION OF COSTS (1) Unless otherwise ordered by the court, within 10 days after the entry of a judgment allowing costs, a prevailing claimant shall serve on the parties against whom costs are to be allowed an application for taxation of costs. The application must be filed with the court.
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> (2) The application for taxation of costs must be signed by the attorney for the claimant, or the claimant personally, if appearing pro sé. The signature on the application is a certification by the person signing the application of the accuracy of the costs claimed and that the costs incurred were reasonable and necessary to the case.
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> (3) The court will allow reasonable costs. The reasonableness of a given item of cost claimed is judged in light of the facts and circumstances of the case, and the issues upon which the claimant prevailed.
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> (4) The following are examples of costs that are generally found to be reasonable:
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> (a) deposition costs (reporter's fee and transcription cost), if the deposition is filed with the court;
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> (b) witness fees and mileage, as allowed by statute, for non-party fact witnesses;
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> (c) expert witness fees, including reasonable preparation time, for testimony either at deposition or at trial, but not at both;
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> (d) travel and lodging expenses of counsel for attending depositions;
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> (e) fees and expenses necessary for perpetuation or presentation of evidence offered at trial, such as recording, videotaping or photographing exhibits;
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> (f) documented photocopy expenses;
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> (g) documented long-distance telephone expenses; and
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> (h) documented postage expenses.
>
> (5) The following are examples of costs that are generally found not to be reasonable:
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> (a) trial transcripts ordered by the parties prior to any appeal;
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> (b) secretarial time; and
>
> (c) items of ordinary office overhead not typically billed to clients.

(6) Items of cost not specifically listed in this rule may be awarded by the court, in accordance with the principles in (3).

(7) An insurer may make specific objection to any item of costs claimed within 10 days of the service of the application.

Applying the general standard adopted by the rule, I find that the consultation fee for Jack Stevens is a recoverable cost. In *Kloepfer* the Supreme Court held that a claimant is entitled to recover the amount paid a treating physician with respect to his testimony on behalf of the claimant, and that such amount is not limited to the statutory witness fee. It said,

> We conclude that the workers' compensation statutes do not require that we diminish a claimant's award by making the claimant pay the high costs of medical depositions which are a requirement in many cases for obtaining benefits.

Id. at 82-83. Mr. Stevens was employed by claimant to help guide him through complicated calculations involving the social security offset. His employment, as an expert, was reasonably necessary in pursuing his petition and the cost of his services is therefore recoverable.

Claimant's request for his costs on appeal is governed by Rule 33 of the Rules of Appellate Procedure which provides in relevant part:

> **(a) Costs on Appeal.** Costs on appeal in civil cases will be taxed as provided by section 25-10-104, Montana Code Annotated, and if not otherwise provided by the court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 25-10-503, Montana Code Annotated.

The rule provides for the "automatic" award of costs to a successful party whether or not the costs are mentioned in the Supreme Court decision. The claim for costs on appeal must, however, be made in accordance with section 25-10-503, MCA, which provides that the party claiming costs must submit his or her claim to the clerk of the trial court within 30 days after remittitur. Section 25-10-503, MCA, provides:

How costs on appeal claimed. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed in 25-10-501, and thereafter he may have an execution therefor as upon a judgment.

Remittitur in this case was filed by the clerk of this Court on April 26, 1996. On May 9, 1996, the Court received and filed Claimant's Petition for Assessment of Attorney's Fees, Costs, and Penalties. Therein, he requested that the actual assessment be deferred because of the need for further proceedings on remand, including resolution of his request for class

action certification. On May 21, 1996, the respondent filed a response indicating its agreement that the assessment of costs was premature. (Respondent/insurer's Response to Claimant's Petition for Assessment of Attorney's Fees, Costs and Penalties.) Then, on October 28, 1996, the Court received a stipulation identifying the remaining issues on remand and providing for submission of a memorandum of costs within 15 days of the Court's approval of the stipulation. On October 28, 1996, the Court approved the stipulation. The Claimant's Memorandum of Costs was filed November 1, 1996.

From the foregoing history, it appears that the claimant made timely application for costs and that the parties agreed that the amount of costs actually due should be deferred to a later time, thus extending the time for submission of the Claimant's Memorandum of Costs. That agreement and the subsequent stipulation reached by the parties amounts, at the very least, amounts to a waiver by respondent of any technical non-compliance with section 25-10-503, MCA. I therefore find that the application for costs on appeal was timely and that the costs of appeal, as itemized by claimant, are recoverable from respondent.

The final item at issue is the cost of a transcript of a hearing held September 3, 1996. There is no indication that a transcript of that hearing is essential to further proceedings in this case. There has been no further appeal, thus an award of this cost is premature. This item is **denied**.

THEREFORE, IT IS ORDERED that respondent shall pay claimant costs in the amount of $1,159.10.

DATED in Helena, Montana, this 17th day of November, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. William O. Bronson
Mr. Thomas E. Martello
Submitted: November 1, 1997