IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 20

WCC No. 2001-0321

GARY GALETTI

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer

and

DEPARTMENT OF LABOR AND INDUSTRY/ SUBSEQUENT INJURY FUND

Respondent.

ORDER ON COSTS

Summary: A claim for permanent partial disability benefits was dismissed on agreement of the parties after certain benefits were paid, but claimant reserved his demand for attorneys fees, costs, and a penalty. After the Court granted summary judgment in claimant's favor on the attorneys fees and penalty issue, claimant submitted a bill of costs, including fees associated with an expert vocational consultant's preparation to testify.

Held: Under ARM 24.5.342, recovery of expert witness fees is permitted only where the expert testifies at trial or deposition.

Topics:

> **Costs: WCC Costs.** Under ARM 24.5.342, recovery of expert witness fees is permitted only where the expert testifies at trial or deposition.

¶1 Petitioner has filed a claim for costs in the Workers' Compensation Court, including postage ($102.08), photocopies ($307.62), long distance telephone calls ($85.12), faxes ($42.50), mileage for attorney travel ($57.80), expert witness fee of Dr. Buehler ($50.00), and expert witness fee of Herb Keating ($130.00). The total claimed is $775.12.

¶2 Respondent Montana Power Company (MPC) objected only to the witness fee of Herb Keating (Keating), arguing that Keating, a vocational consultant, did not testify at any deposition or at trial. Petitioner argues the fee should be allowed as "reasonable preparation time for him to prepare testimony for trial," urging that actual testimony is not required.

¶3 The petition, filed May 4, 2001, sought permanent partial disability benefits as a lump sum, as well as penalty, attorney's fees, and other relief deemed proper by the Court. As noted in this Court's November 20, 2001 Partial Judgment and Dismissal with Prejudice, after filing of the petition, the claim for permanent partial disability benefits was resolved by MPC paying 2 6/7 weeks of benefits to claimant while the Subsequent Injury Fund paid him an additional $41,000. The parties stipulated to dismiss the claim for benefits, reserving for decision whether "the claimant's requests for attorney fees, costs, and a penalty against Montana Power Company," which were later resolved in favor of claimant on a motion for summary judgment. No trial was ever held in this case and no vocational testimony was ever taken.

¶4 Recovery of costs is governed by Rule 24.5.342. Subsection (3) provides generally:

> 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.

Subsection (4) of the rule sets out examples of costs generally deemed reasonable. Subsection (4)(c) provides for recovery of "expert witness fees, including reasonable preparation time, for testimony either at deposition or at trial, but not at both." Keating's consultation fee does not fall within the subsection since he did not testify either by deposition or at trial.

¶5 Subsection (6) of the rule gives the Court discretion to award costs not specifically enumerated in subsection (4), providing, "Items of cost not specifically listed in this rule may be awarded by the court, in accordance with the principles in (3)." That discretion, however, must be exercised consistently with the rest of the rule, including the costs enumerated in subsection (4) as recoverable. That subsection expressly provides for recovery of expert witness fees but only where the expert testifies. By implication, the subsection did not contemplate recovery of expert fees where the expert does not testify and adding such provision under the auspices of subsection (6) would nullify the limitations inherent in subsection (4) and open the door for awards of costs not directly connected to trial of a matter, including costs of depositions never used at trial. I decline to expand the circumstances for an award of expert witness fees beyond the provision of subsection (4)(c).

¶6 My determination in this matter is consistent with case law, as well as the rule. In cases where a matter has proceeded to trial, the Workers' Compensation Court typically allows recovery of an expert's "consultation" or "preparation" time **only** if the expert actually testifies at deposition or trial. This history was summarized in *Brown v. Liberty Mutual Fire Insurance Company*, WCC No. 9505-7315 (November 1, 1995):

There are also orders which indicate that consideration was given to a request for consultation fees. In *Sandru v. The Montana Power Company*, WCC 8602-3508, Order Awarding Attorney Fees and Costs, November 14, 1986, the defendant objected to costs for a doctor the claimant interviewed but did not call as a witness and whose reports were not introduced. The Court disallowed those costs. In *Hawkins v. State Compensation Insurance Fund*, WCC No. 8706-4470, Order Denying Motion for Evidentiary Haring; Order Awarding Attorney Fees and Costs, October 25, 1988, the Court specifically disallowed costs for time spent in the preparation and taking of depositions which pertained to issues on which the claimant did not prevail. This included a cost to National Rehabilitation Consultants.

Finally, it must be noted that under the 1987 law the Court held in *Koffler v. State Compensation Mutual Insurance Fund*, WCC No. 9108-6224, Order Granting Costs at 1, September 24, 1992:

> The claimant requests costs for an expert consultant of $350.00. The expert did not testify at trial or by deposition. The use of an expert consultant by claimant's counsel is considered as research of an issue and cannot be charged to the insurer.

Clearly, the Court has authority to grant costs for consultation fees based on its previous orders. Equally clear is that the expert witness fees have been assessed where the expert testifies regarding an issue on which the claimant prevails, while they have not been allowed where the expert does not testify or claimant does not prevail on the issue.

Brown at 3.

¶7 Accordingly, the Keating fee is disallowed. Costs in the amount of $645.12, are awarded and shall be paid by Montana Power Company.

SO ORDERED.

DATED in Helena, Montana, this 8th day of April, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. Kelly M. Wills
Ms. Julia W. Swingley
Submitted: April 1, 2002