IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 55A-2

WCC No. 9110-6271

LINDA MILLER

Petitioner

vs.

WESTERN GUARANTY FUND SERVICES

Respondent/Insurer for

MAURINE FRASURE d/b/a O'HAIRE MOTOR INN RESTAURANT

Employer.

ORDER GRANTING ADDITIONAL COSTS; ORDER DENYING MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The Court has two post-trial motions before it. One is a motion to tax additional costs to respondent and is based on the Court's failure to consider a supplemental bill of costs filed by the claimant. The other motion, filed by respondent, Western Guaranty Fund Services (Western), requests the Court to recompute claimant's loss of earning capacity.

Western's motion is **denied**. It presents no new matter. Its remedy is an appeal rather than to argue with this Court.

The claimant's request that the Court revisit costs, however, is well taken. Claimant filed her original request for costs on May 12, 1994. However, since two years have passed and additional costs have been incurred in the case, the claimant requested the opportunity to supplement her request. She did so on May 10, 1996, in her Petitioner's Application for Taxation of Costs. The Court overlooked this later filing when it entered its Order Awarding Attorney Fees and Costs (July 29, 1996). The additional costs claimed in the May 10, 1996 request, and not considered by the Court, are as follows:

A. Deposition of Susan Austad	$30.00
w/Copies of Exhibits	$10.00
Deposition of Mary Ann Driscoll	$40.50

w/Copies of Exhibits	$19.00
	$99.50

B. 1992 Depositions of Dr. Dennis Dietrich

	$115.50
	$312.50
	$428.00

C. Depositions of petitioner Linda Miller

1. February 21, 1992	$114.00
2. April 5, 1995	$ 88.00
3. April 10, 1996	$ 66.00
	$268.00

D. Expert witness fees for Dr. Dennis Dietrich, M.D. - time spent giving deposition, reviewing and signing deposition:

1. April 24, 1992	$140.00
2. July 17, 1992	$1,060.00
	$1,200.00

E. Expert witness fees for Pete Sesselman, CRC - for time and expense spent in researching and testifying on those subjects permitted by the Court at hearing on April 30, 1996: $776.12

F. Photocopy expenses for cost of making copy of the 1992 trial transcript: $103.40

G. Postage expenses for mailing transcript to the Court: $ 6.75

H. Other Costs:

1. Costs charged by Dr. Dietrich's Office on May 19, 1992, to obtain medical records: $ 56.00

2. Costs charged by Dr. Dietrich's office on July 15, 1992, to obtain medical records: $ 10.00

The Court finds that some of these additional costs are taxable to Western and some are not, as follows:

1. Depositions of Susan Austad and Mary Ann Driscoll. These depositions were taken in April 1996, long after remand, and apparently pertain to foster care

provided by claimant. The Austad deposition was initially filed with the Court, but later withdrawn at trial. The Driscoll deposition was never filed. The costs for depositions not used at trial are generally not taxable. *McGinley v. Ole's Country Store's Inc.,* 241 Mont. 248, 250, 786 P.2d 1156-7 (1990). Moreover, although taken at the behest of Western, the matters covered in these depositions plainly exceeded the scope of the issues on remand. Copies of the depositions were unnecessary and the request for the costs is **denied**.

2. Dr. Dietrich's 1992 Depositions and Expert Witness Fees. Western argues that Dr. Dietrich's depositions were taken to support claimant's assertion that she is permanently totally disabled and that the depositions therefore related to an issue on which the claimant did not prevail. The Court agrees. Western asserted in the original pretrial order filed February 26, 1996, that claimant was permanently partially disabled and employable. Having read Dr. Dietrich's depositions I am persuaded that they were taken to support claimant's total disability argument. Dr. Dietrich's opinions concerning claimant's ability to work were not adopted by the Court and claimant was determined to be only permanently partially disabled. Claimant is not entitled to costs incurred in connection with issues upon which she did not prevail. *Carrie Brown v. Liberty Mutual Fire Ins. Co.,* WCC No. 9505-7315, Order Awarding Costs at 2-3 (November 1, 1995). The requests for costs associated with Dr. Dietrich's depositions are therefore **denied**.

3. Depositions of Linda Miller.

> a. 1995 and 1996 Depositions of Linda Miller. The issue on remand involved an arithmetical computation and claimant's testimony was unnecessary. The 1996 deposition was never filed with the Court and neither deposition was utilized by the Court in reaching its decision. The request is **denied.**
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> b. February 21, 1992 Deposition of Linda Miller. This deposition was neither submitted to the Court for its consideration in reaching its decision nor used during trial. The request for taxation of the cost of a copy of this deposition is therefore **denied**.

4. Trial Testimony and Expert Witness Fee of Peter F. Sesselman. Western objects to the expert witness fee submitted for Peter F. Sesselman, a vocational expert who testified on behalf of claimant. Western argues that Sesselman was employed for purposes beyond the limited matters at issue on remand and that the invoice for his services fails to affirmatively show that his services related to the issues at trial.

While the nature of some of the services are not as clear as they should be, Western's argument that only .6 hours of the 13.8 hours billed relate to matters at issue at trial (Respondent's Objections, May 21, 1996) is without merit. In the prior

proceeding, the Court identified five potential jobs as suitable for claimant, those jobs being: receptionist, nursing secretary, civil clerk, office clerk, and patient billing clerk. Claimant's prior job was as a waitress. Sesselman's entries indicate he spent 1.8 hours surveying "Acct. Clk" positions and .6 surveying "Waitress Wages." An accounting clerk is plainly a related clerical job of the type identified in the original trial. He also spent 2.0 hours surveying "Recept/Ticket." Sesselman testified at trial that he contacted ten employers for information on receptionists, one of the potential positions he had identified. Sesselman also surveyed a job described as "Telephone Ans," which the Court takes to mean a telephone answering position. Receptionists may spend much of their time answering telephones, so such a position may fairly be considered. Finally, Sesselman surveyed a keno caller job for 1.0 hours. Keno caller is a job requiring few physical abilities and few skills. Claimant is overqualified for that job but it is not one which is necessarily outside her labor market or physical abilities. Sesselman spent the remainder of his time talking to claimant's attorney (.3 hours), doing file review, checking wage and labor market statistics, waiting at the Court for his turn to testify, and testifying. Thus, the invoice presents clear and unequivocal evidence that Sesselman spent his time identifying wages for waitresses and for jobs of the sort the Court previously found her qualified to perform. Western's suggestion that he spent his time on unrelated matters is utterly unsupported and spurious. The full amount of $776.12 is **allowed**.

5. Photocopies and Postage. These costs are claimed with respect to a copy of the transcript furnished by claimant's counsel to the Workers' Compensation Court in May 1993. Counsel for claimant represents that it is his "recollection that the clerk requested a copy of the transcript in May 1993." (Petitioner's Combined Request to Amend and Application for Taxation of Costs at 4.) The claimant filed a Notice of Appeal on May 20, 1993. As the appealing party, claimant was responsible for furnishing an original and two copies of the transcript. If the copy at issue here is one of those copies, then it is a cost on appeal. Claimant has not sought costs for appeal. Therefore, this item is **denied**.

6. Copies of Dr. Dietrich's records. Western objects to payment for the records on the ground that they were related to the total disability issue upon which claimant did not prevail. However, copies of medical records are commonly provided to the Court as background information on the claimant's condition and the expense of such records is ordinarily taxable. *See Rocky G. Rooney v. Credit General Insurance,* WCC No. 9411-7166, Order Awarding Costs (October 23, 1995). Dr. Dietrich was claimant's treating physician. The request of $66.00 incurred to secure his records is **allowed**.

IT IS THEREFORE ORDERED that costs in the amount of $776.12 for Peter Sesselman's research and testimony plus $66.00 charged by Dr. Dietrich's office to obtain medical

records are **allowed.** The total amount of $842.12 (*$776.12 + $66.00*) is to be added to the previous award of costs. Therefore, the prior order for costs is amended to award claimant a total of $2,916.46 (*$2,074.34 + $842.12)* in costs.

SO ORDERED.

DATED in Helena, Montana, this 10th day of September, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. William O. Bronson
Mr. K. Dale Schwanke
Submitted: August 30, 1996