

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 74A-4

WCC No. 9307-6842

LUCY OSBORNE,

Petitioner,

vs.

PLANET INSURANCE COMPANY,

Respondent/Insurer for

RHONE-POULENC BASIC CHEMICAL CO.,

Employer.

ORDER AWARDING COSTS

On December 19, 1994, this Court issued its amended findings of fact and conclusions of law and judgment. The Court determined that claimant was entitled to costs. Petitioner, Lucy Osborne, submitted her statement of costs, seeking costs in the amount of \$3,935.35. Respondent filed its objections to statement of costs, disputing the following charges:

Prep time & attendance (Dewey deposition)	\$ 952.80
Fees for exemplification & copies	150.00
Expert witness fee: Mike Anderson	1,619.75
Prep time (Murphy deposition)	490.00
Depositions (Candi Nordhagen)	<u>133.00</u>
TOTAL	\$3,345.55

Subsequently, petitioner corrected the amount of her request for copies of exhibits from \$150 to \$15, adjusting her total request for costs downward to \$3,800.35.

Expert witness fees were addressed by this Court in *Kloepfer v. Lumbermens Mutual Casualty Co.*, in its order denying petitioner's request for redetermination of costs issued June 22, 1994. The Court denied expert witness fees in excess of \$10, stating:

Petitioner further argues that **Witty v. Pluid**, 220 Mont. 272, 273, 714 P.2d 169 (1986), in which the Supreme Court held that expert witness fees are limited to \$10 per day per witness, concerned costs in a district court proceeding and is therefore inapplicable to the Workers' Compensation Court. **However, in Baeta v. State Compensation Mutual Insurance Fund**, 254 Mont. 487, 839 P.2d 566, (1992), the Supreme Court held that the same cost statute governing district court proceedings (§ 25-10-201, MCA) is applicable to proceedings in the Workers' Compensation Court. In **Witty** the Court specifically considered the fees which may be awarded to experts under section 25-10-201. It determined that the section does not permit a fee greater than \$10 because section 26-2-505, MCA, provides that "[a]n expert is a witness and receives the same compensation as a witness" and section 26-2-501, MCA, provides that a witness is entitled to \$10 for each day of attendance at trial. [Emphasis added.]

Under **Witty** petitioner is limited to the ten dollar (\$10) witness fee for expert Anderson.

In **Thayer v. Hicks**, 243 Mont. 138, 158, 793 P.2d 784 (1990), the Supreme Court discussed costs, writing:

Not all litigation expenses that may properly be billed to a client may necessarily be recovered from the opposing party. Only those costs delineated in sec. 25-10-201, MCA, may be charged to the opposing party unless the item of expense is taken out of sec. 25-10-201, MCA, by a more specialized statute, by stipulation of the parties or by rule of court. **Luppold v. Lewis**, 172 Mont. 280, 292, 563 P.2d 538, 545 (1977).

The prevailing party has the burden of proving that each disbursement that does not fall within the statutory list is within the purview of the statute.

Section 25-10-201, MCA, is applicable to the Workers' Compensation Court. **Baeta v. State Compensation Mutual Insurance Fund**, 254 Mont. 487, 839 P.2d 566 (1992).

Petitioner does not argue that the disputed costs for preparation time are governed by a special statute. Rather, she contends that Rule 26(b)(4)(c) Mont.R.Civ.P. provides that the person taking the deposition is responsible for all costs incurred, including preparation time. The rule provides in pertinent part:

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Petitioner asks the Court to apply the rule to fees charged by Dr. Murphy for the time spent preparing for his deposition. Assuming for purposes of this case that the rule applies to expert witnesses depositions taken in connection with cases pending before this Court, the rule does not benefit petitioner. It applies where a party deposes or seeks additional discovery from the opposing party's expert witness. Both Dr. Murphy's and Dr. Dewey's depositions were taken at petitioners behest. notice of preparation deposition (December 10, 1993); notice of deposition (September 10, 1993). Deposition preparation fees are therefore **denied**. The actual cost of the depositions in the amounts of \$174.75 and \$84 are **allowed**.

There is insufficient information in this file to justify the charge of \$133 to Candi Nordhagen for depositions. The charge is not keyed to any particular deposition and is therefore **denied**.

The petitioner is entitled to recover from the respondent the following costs:

Dewey deposition	\$ 178.75
Osborne & Knutsen depositions	147.05
Medical reports (Butte Ortho.)	75.00
Fees for exhibits	15.00
Medical report (Rocky MT)	25.00
Mike Anderson (expert witness)	10.00
Medical report (Butte Ortho.)	80.00
Murphy deposition	<u>84.00</u>
TOTAL	\$ 614.80

IT IS HEREBY ORDERED that petitioner shall recover from the respondent the sum of \$614.80 in costs.

The Order herein is certified as final for purposes of appeal to the Montana Supreme Court pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 26th day of January, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Leonard J. Haxby
Mr. Brendon J. Rohan