

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 59A-2

WCC No. 9403-7017

DAVID WILLIAMS

Petitioner

vs.

PLUM CREEK TIMBER COMPANY

Respondent/Employer.

ORDER AWARDING COSTS ON APPEAL

The Judgment in this matter was issued by the Workers' Compensation Court on June 28, 1994, finding that the claimant was entitled to permanent partial disability benefits and to costs. Attorney fees and a penalty were specifically denied. The claimant appealed the attorney fees and penalty issues to the Supreme Court. On March 7, 1995, the decision of the Workers' Compensation Court was **affirmed**.

The respondent requests costs on appeal. The matter is briefed and ready for decision.

Costs on appeal are governed by section 25-10-104, MCA, which provides,

25-10-104. When costs of appeal discretionary. (1) In the following cases, the costs of appeal are in the discretion of the court:

(a) when a new trial is ordered;

(b) when a judgment is modified.

(2) In all other cases the successful party shall recover from the other party his costs.

The statute is specific that an award of costs is mandatory unless a new trial is ordered or the judgment is modified.

Rule 33(a), Mont.R.App.P., 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. . . .

Since the Supreme Court decision in this case makes no specific provision concerning costs, they are deemed to be "automatically awarded to the successful party."

Relying on *State ex. rel. Nesbitt v. District Court*, 119 Mont. 198, 173 P.2d 412 (1946) and *Marriage of Kuzara*, 224 Mont. 124, 728 P.2d 786 (1986), the claimant argues that the respondent cannot be considered a "successful party" because there were no legal questions reversed on appeal. These cases are inapposite; they apply only in considering whether the *appellant* was the successful party on appeal.

In *Nesbitt* the Supreme Court granted a writ of supervisory control from a district court order which granted costs to the defendants. The Supreme Court had previously ruled for the plaintiffs in all respects except that it had found the judgment to be excessive and remanded the case with instructions that a new trial be granted unless the plaintiffs accepted a smaller amount. The matter was ultimately resolved by the second alternative. The trial court then awarded costs of the appeal to the defendants, apparently relying on the fact that the Supreme Court had modified the judgment. Plaintiffs appealed the award and the Supreme Court found that defendants should not be considered the successful parties in the prior appeal because the modification made by the Court was insignificant.

The Supreme Court reached the same conclusion in *Kuzara*. As in *Nesbitt* the modifications ordered by the Supreme Court were deemed too minor to characterize the appellant as the successful party.

In this case the claimant appealed the penalty and attorney fee issues. The Supreme Court affirmed this Court's decision. Obviously, if the Supreme Court **affirms** a decision then the appellant was unsuccessful and the respondent must be considered the successful party entitled to costs under section 25-10-104, MCA.

Claimant's argument that insurers in workers' compensation cases are never entitled to costs is also without merit. Claimant cites *North American Van Lines v. Evans Transfer & Storage*, 234 Mont. 209, 766 P.2d 220 (1988) and *Jaenish v. Super 8 Motel*, 248 Mont. 383, 812 P.2d. 1241 (1991). Those cases concerned attorney fees and costs awarded pursuant to sections 39-71-611 and -612, MCA, by the Workers' Compensation Court after trial. They did not discuss **costs on appeal**, which are controlled by section 25-10-104, MCA.

Section 25-10-201, MCA, enumerates the costs which may be recovered by the successful party. *Baeta v. Don Tripp Trucking*, 254 Mont. 487, 839 P.2d 566 (1992). The section provides:

25-10-201. Costs generally allowable. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

- (1) the legal fees of witnesses, including mileage, or referees and other officers;
- (2) the expenses of taking depositions;
- (3) the legal fees for publication when publication is directed;
- (4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;
- (5) the legal fees paid stenographers for per diem or for copies;
- (6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
- (7) the reasonable expenses of making transcript for the supreme court;
- (8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
- (9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.

The costs for the Clerk of Court fees, transcript, and respondent's brief are allowed pursuant subsections (4), (6) and (7). Rule 33(b) and 25(g), Mont.R.App.P., also authorize the award of the costs of the brief on appeal. The cost for the deposition of David Williams is disallowed as that cost is properly a trial cost and cannot be considered as a cost on appeal.

Therefore, IT IS HEREBY ORDERED that respondent shall recover from the petitioner the sum of \$288.37 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 2nd day of June, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Kelly M. Wills