

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWC 87

WCC No. 9505-7315

CARRIE BROWN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

EAST COUNTY MARKET

Employer.

ORDER AWARDING COSTS

Summary: Insurer disputed petitioner's claim for costs associated with doctor's "records review" and "consultation" and for expenses of claimant and her children in traveling from Alaska to Montana for trial.

Held: Under *Kloepfer v. Bechtel Construction Co*, 272 Mont. 78, 52 St. Rptr. 663 (1995), the costs recoverable in the Workers' Compensation Court under the reasonable costs standard are not necessarily comparable to those recoverable in a district court case and are typically those costs the Workers' Compensation Court has historically awarded. The cost of medical testimony and depositions has long been recoverable. Here, the insurer does not object to costs of the doctor's testimony but objects to costs for records review and consultation. Where those costs were essential to the doctor's preparation for testimony at trial on issues on which claimant prevailed, and his preparation undoubtedly reduced the time spent on testimony, those costs are allowed. While the WCC has sometimes allowed travel costs of claimant and sometimes not, those costs are not allowed here where claimant's testimony was not essential to trial. There is no support for allowing costs of travel for her children; those costs are disallowed.

Topics:

Costs: WCC Costs. Under *Kloepfer v. Bechtel Construction Co*, 272 Mont. 78, 52 St. Rptr. 663 (1995), the costs recoverable in the Workers' Compensation Court under the reasonable costs standard are not necessarily comparable to those recoverable in a district court case and are typically those costs the Workers' Compensation Court has historically awarded.

Costs: WCC Costs. The cost of medical testimony and depositions has long been recoverable in WCC cases. Although the insurer objects to the testifying doctor's charges for "records review" and "consultation," those costs are recoverable where they were essential to the doctor's preparation for testimony at trial on issues on which claimant prevailed, and his preparation undoubtedly reduced the time spent on testimony.

Costs: WCC Costs. While the WCC has sometimes allowed travel costs of claimant and sometimes not, those costs are not allowed here where claimant's testimony was not essential to trial. There is no support for allowing costs of travel for claimant's children.

The trial in this matter was held on August 28, 1995. At the close of trial a bench ruling was made and the Court has been advised there will be no appeal of that ruling by the insurer.

Claimant filed her Petition for Costs on September 18, 1995. Insurer responded, disputing the costs for records review and expert consultation and for travel expenses for the claimant and her children to attend the trial.

Insurer does not dispute the cost for the doctor's testimony at the time of trial in the amount of \$300.00 nor the cost for the claimant's deposition in the amount of \$81.15.

Claimant maintains that she is entitled to all costs for the medical expenses charged by Dr. Dingeman of Fairbanks, Alaska. These charges were broken down to reflect; (1) a records review - \$100.00, (2) telephone conversation - \$150.00, and (3) deposition with the Judge (trial testimony) - \$300.00. Insurer concedes the cost of the trial testimony but argues that the other two charges are not reasonable costs which have been "historically" allowed by the Workers' Compensation Court.

On July 25, 1995, the Montana Supreme Court issued its decision in *Kloepfer v. Bechtel Construction Co.*, 52 St.Rptr. 663 (1995). The Supreme Court found that "the costs payable in Workers' Compensation Court under the reasonable costs standard are not necessarily comparable to the standard applied in normal district court cases." Specifically,

the court held “there is no issue of fact regarding the past practice of the Workers’ Compensation Court to award a successful claimant the cost of medical testimony and depositions.” The Court expressly overruled its prior holdings in *Baeta v. Don Tripp Trucking*, 254 Mont. 487, 839 P.2d 566, (1992) and *Stevens v. State Compensation Insurance Fund*, 268 Mont. 460, 886 P.2d 962 (1994) that costs in workers’ compensation cases are governed by section 25-10-201, MCA. Essentially the Supreme Court held reasonable costs under the statutes are those which the Court has historically awarded.

A fairly extensive review of the attorney fee and cost decisions of the Workers’ Compensation Court demonstrate that expert witness fees and consultation fees have been “historically” allowed in a number of cases. As early as 1981, when Judge William E. Hunt presided, the Court ordered:

The defendant will pay to the claimant the sum of \$946.36 to reimburse claimant for the costs of depositions and an expert witness fee incurred in connection with the pending petition.

Kovatch v. Universal Underwriters Insurance Company, Docket No. 1080, Judgment at 2, August 27, 1981.

In the mid 1980's the Court held that only those costs incurred in the **pursuit of issues prevailed upon** will be allowed:

[B]efore a Workers’ Compensation Judge could approve costs incurred in pursuit of a claimant’s case, the costs must be shown to be related to issues that the claimant ultimately prevailed upon. No other costs can be found both necessary and reasonable.

Taylor v. Transportation Insurance Company, WCC No. 8406-2479, Order Awarding Attorney Fees and Costs at 1, April 8, 1985.

In reviewing the prior orders of this Court, it must be noted that rarely was there a separation or breakdown of the costs paid to an expert witness. The orders do not reflect a specific amount paid as a consultation fee and a specific amount for the deposition fee. What is clear is that all of the expert’s fee was paid. There are instances where it is obvious that more than a deposition fee was paid. For example in *Estrada v. Intermountain Insurance Company*, Docket No. 1998, Order Awarding Attorney Fees at 1, August 7, 1985, the Court found:

Claimant requested costs totaling \$5,594.07. Defendant objected to all costs exceeding \$5.00. The Court awards the following costs as being both

reasonable and necessary to issues claimant ultimately prevailed upon or so intertwined with successful issues that they are impossible to separate.

Charges for records, reports, giving depositions, court appearances, etc., of doctors and other experts

The Court then went on to itemize a number of charges which included Dr. Schemm - \$244.00 and the Northwest Pain Center - \$1,275.00 as being allowed; in addition to that charge, the Court ordered payment for the depositions of Dr. Schemm and Dr. Adams - \$195.00 and the doctors at the Northwest Pain Clinic - \$692.93. In this same decision the Court allowed “[t]ravel costs and expenses for **witness interview** and depositions.”

Another example which supports the position that the Court has historically allowed expert witness and consultation fees is found in *Gray v. Columbus Hospital*, WCC No. 8612-4073, Order Regarding Attorney Fees, September 30, 1988. In *Gray*, over the defendant’s objection the Court allowed costs for Assoc. Vocational Consultants Fee - \$444.75, and Board Certified Rehab Fee - \$1,041.30.

There are also orders which indicate that consideration was given to a request for consultation fees. In *Sandru v. The Montana Power Company*, WCC No. 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 *Hankins v. State Compensation Insurance Fund*, WCC No. 8706-4470, Order Denying Motion for Evidentiary Hearing; 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 the 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.

In this case the claimant prevailed upon the medical issues. The doctor's review of the record and the telephone consultation was essential to his preparation for testifying at trial and the time spent and his charges were reasonable. The doctor's preparation undoubtedly reduced the time spent taking testimony at the time of the trial. Costs associated with testimony and preparation to testify which is done shortly before trial or deposition are recoverable.

The claimant also requests \$3,300.00 for claimant's travel expenses from Alaska to Montana for trial. No documentation for this expense was presented to the Court.

The search for cases in which claimant's airfare or travel expenses was at issue, revealed that the Court has both allowed and denied such expenses. In *Jakovac v. Osco Drug Incorporated*, WCC No. 8703-4275, Order Denying Motion for Evidentiary Hearing Order Awarding Attorney Fees at 3, July 22, 1988, the Court stated: "In this case, the Court will not disallow the claimant's travel time nor any of the costs related to travel." However, in *Cutlip v. Truck Insurance Exchange*, WCC No. 9111-6296, Order on Attorney Fees and Costs at 2, September 14, 1992, the claimant's airfare from Tennessee was specifically denied. "The cost of airfare reimbursement in the amount of \$402.00, the claimant's cost for appearing at trial, is **denied.**" (Emphasis in original.) While not specific as to whether the cost for travel was for the claimant, the Court held in *Collins v. State Compensation Insurance Fund*, WCC No. 8904-5306, Order Awarding Attorney Fees and Costs, April 18, 1990 that:

Though travel is not always awarded, in this instance, because of the expedited nature in the fact that trial was held in Helena, the costs will be awarded.

Thus, from the historical perspective, the line that separates travel expenses which may be recouped from those which may not be is unclear.

In this case I find that travel expenses must be disallowed. The costs apparently include airfare for the claimant's children because she was unable to make day care arrangements for her children. Her efforts to find day care are not documented and there is no precedent requiring an insurer to pay a claimant for the care and/or travel expenses of his/her children.

As to the request for claimant's personal airfare, the issue in this case was a medical one. While claimant chose to attend trial, her testimony and presence was not essential to the case. The parties were able to arrive at an agreeable alternative to in-court testimony by claimant's physician, and there is nothing to indicate that the insurer insisted on the claimant's personal presence at trial. The choice to attend was hers and the cost will not be charged to the insurer.

IT IS HEREBY ORDERED that the insurer pay costs in the amount of \$631.15.
Travel expenses in the amount of \$3,300.00 are **denied**.

Dated in Helena, Montana, this 1st day of November, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Andrew F. Scott
Mr. Larry W. Jones
Submitted Date: October 13, 1995