

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 6

WCC No. 2005-1241

MELVIN BRIESE

Petitioner

vs.

ACE AMERICAN INSURANCE COMPANY

Respondent/Insurer.

ORDER ON COSTS

Summary: Petitioner filed a claim for costs pursuant to the Court's award of costs in its Findings of Fact, Conclusions of Law and Judgment. Respondent objected to two of the costs claimed by Petitioner. First, Respondent objected to paying the cost of Petitioner's copy of a transcript of a deposition taken by Respondent. Second, Respondent objected to paying the cost of a fee charged to Petitioner by an expert witness for responding to questions Petitioner's counsel posed to the expert in a letter prior to the expert's deposition.

Held: Petitioner's claim for the copy of the deposition transcript is granted. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. As a practical consideration, a deposition transcript is generally necessary to prepare for trial and to prepare for examination of other witnesses. Additionally, the Court encourages all parties to file proposed findings of fact and conclusions of law. A deposition transcript is needed to accurately reflect the record in those findings of fact and conclusions of law. Petitioner's claim for the cost of the expert fee charged for answering Petitioner's letter prior to the deposition is denied. The letter was unnecessary since Petitioner was allowed to depose the expert at no cost and the letter was not specifically used by Petitioner in the deposition.

Topics:

Costs: Workers' Compensation Court Costs. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. ARM 24.5.342. The Court has wide discretion to determine what is reasonable. The Court finds the claim for the cost of a copy of a deposition transcript to be reasonable because a deposition transcript is generally necessary to prepare for trial and examination of witnesses, and to provide guidance in writing proposed findings of fact and conclusions of law.

ARM 24.5.342. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. ARM 24.5.342. The Court has wide discretion to determine what is reasonable. The Court finds the claim for the cost of a copy of a deposition transcript to be reasonable because a deposition transcript is generally necessary to prepare for trial and examination of witnesses, and to provide guidance in writing proposed findings of fact and conclusions of law.

Costs: Workers' Compensation Court Costs. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. ARM 24.5.342. The Court has wide discretion to determine what is reasonable. The Court finds Petitioner's claim for the cost of an expert witness fee to answer written questions asked in a letter from Petitioner is unreasonable where Petitioner was given the opportunity to ask the expert questions at a deposition paid for by Respondent.

ARM 24.5.342. Under the rules of the Workers' Compensation Court, the Court may grant reasonable costs. ARM 24.5.342. The Court has wide discretion to determine what is reasonable. The Court finds Petitioner's claim for the cost of an expert witness fee to answer written questions asked in a letter from Petitioner is unreasonable where Petitioner was given the opportunity to ask the expert questions at a deposition paid for by Respondent.

¶1 On August 16, 2005, the Court awarded Petitioner, Melvin Briese, his costs.¹ Pursuant to the Court's request, Petitioner filed an Affidavit of Costs on August 25, 2005. The following is a list of the costs contained in Petitioner's affidavit:

¹ Findings of Fact, Conclusions of Law and Judgment, 2005 MTWCC 50 at 6.

Postage	\$	46.18
Photocopies		286.63
Long Distance Telephone Calls		22.44
Faxes (this is typically charged to our clients)		60.00
Court Reporter Expense/Fisher Court Reporting, Inc. (fees for 7 depositions)		1,667.10
Trial Costs:		
Deliver Exhibits to Court (bus charge)		13.45
Expert Witness/Dr. J. Campbell		83.40
Mileage Expense/Ross Wetzler		51.34
Mileage Expense/Chris Ragar		72.42
Per Diem/Chris Ragar		13.00
Lodging in Helena/Chris Ragar		<u>80.89</u>
TOTAL		\$2,396.85

¶2 Respondent concedes that Petitioner is entitled to \$1,654.80 in costs. However, Respondent contests the cost of two items sought by Petitioner. First, Respondent contests Petitioner's cost of \$658.65, the cost of obtaining copies of five deposition transcripts.² Additionally, Respondent contests Petitioner's cost of \$83.40, the cost billed by Dr. John Campbell for time spent answering a letter from Petitioner's counsel.

¶3 The rule addressing costs in the Workers' Compensation Court is found in ARM 24.5.342, which states in pertinent part:

(3) 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.

(4) The following are examples of costs that are generally found to be reasonable:

(a) deposition costs (reporter's fee and transcription cost), if the deposition is filed with the court;

(b) witness fees and mileage, as allowed by statute, for non-party fact witnesses;

(c) expert witness fees, including reasonable preparation time, for testimony either at deposition or at trial, but not at both;

² The breakdown of the cost for the five depositions is contained in the Charles D. Fisher Court Reporting, Inc. receipt attached to Petitioner's Affidavit of Costs. It includes copies for the depositions of John Campbell, M.D.; Melvin Briese; Shane Briese; Debra Briese; and Ross Wetzler. Each of the depositions was paid for by Respondent.

- (d) travel and lodging expenses of counsel for attending depositions;
 - (e) fees and expenses necessary for perpetuation or presentation of evidence offered at trial, such as recording, videotaping or photographing exhibits;
 - (f) documented photocopy expenses;
 - (g) documented long-distance telephone expenses; and
 - (h) documented postage expenses.
- (5) The following are examples of costs that are generally found not to be reasonable:
- (a) trial transcripts ordered by the parties prior to any appeal;
 - (b) secretarial time; and
 - (c) items of ordinary office overhead not typically billed to clients.
- (6) Items of cost not specifically listed in this rule may be awarded by the court, in accordance with the principles in (3).

¶4 The plain language of the rule notes that the Court has wide discretion in determining costs to award. The rule states that 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.”³ The rule provides the Court some guidance by listing costs generally found to be reasonable.⁴

¶5 Respondent argues that ARM 24.5.342 does not allow for the cost of a copy of a deposition. In support of its argument, Respondent cites *Lindeman v. Connecticut Indem. Co.*⁵ In *Lindeman*, the Workers’ Compensation Court stated:

Deposition costs for the original transcript are routinely allowed where the deposition was taken by the claimant and submitted to the Court for consideration in deciding the case. However, an entirely different matter is presented where claimant’s counsel did not bear the cost of the original which is submitted to the Court but is seeking reimbursement for a *copy* of a deposition used in trial preparation. While a copy of a deposition may be useful in trial preparation, it is not a necessary cost in bringing a case to trial. Counsel was present during the depositions at question, thus knew the materials covered in the deposition and the responses given. The cost of a

³ ARM 24.5.342(3).

⁴ See ARM 24.5.342(4).

⁵ 2002 MTWCC 14.

copy of a deposition is not a recoverable cost, therefore, the costs for Dr. Chrzanowski's and Dr. Peterson's depositions must be denied.⁶

¶6 Though, theoretically, a deposition copy may not be necessary in bringing a case to trial, the Court believes the practicalities say otherwise. In that vein, the Court finds the rationale set forth in *Marcott v. Louisiana Pacific Corp.*⁷ to be more persuasive. In *Marcott*, this Court stated:

The claimant's costs of \$4,491.67, as set forth in his Third Amended Affidavit of Costs, are all recoverable. ARM 24.5.342. Included among those costs are costs for both the original and one copy of depositions filed with the Court. Insurer objects to paying for the copy. However, where the original is submitted to the Court, a copy is necessary for cross-examination and, often, for preparing proposed findings and argument. Copies are therefore essential to the use of the original.⁸

¶7 This Court encourages parties to a dispute to submit proposed Findings of Fact, Conclusions of Law and Judgment, when appropriate. In order to prepare accurate proposed findings of fact and conclusions of law, a copy of a deposition transcript is often necessary. In accordance with the principles found in ARM 24.5.342(3), the Court finds the cost of a copy of a deposition to be reasonable, even in circumstances where the non-prevailing party paid for the deposition.

¶8 The second cost disputed by Respondent is the cost of an expert witness fee. On March 16, 2005, Petitioner, through his attorney, sent Dr. Campbell a letter asking him for written responses to several questions. On March 16, 2005, Dr. Campbell sent a letter responding to the questions posed in Petitioner's letter. Dr. Campbell's office then billed Petitioner \$83.40 for the time spent answering Petitioner's questions.

¶9 Petitioner submits that the \$83.40 expense should be allowed as a reasonable cost under ARM 24.5.342(6): "Items of cost not specifically listed in this rule may be awarded by the court, in accordance with the principles in (3)." Petitioner also contends this cost is

⁶ *Id.* at ¶ 5 (emphasis in original).

⁷ 1996 MTWCC 33.

⁸ *Id.* at 1.

similar to fees for expert witness testimony, a cost which is expressly listed as a reasonable cost under the Court's rules.⁹

¶10 The Court is not persuaded to allow the cost of obtaining written answers from Dr. Campbell. The cost is not reasonable under the circumstances of this particular case. Petitioner was given the opportunity to depose Dr. Campbell at the expense of Respondent. Petitioner was not preparing Dr. Campbell for his deposition, as contemplated by ARM 24.5.342(4)(c). Each of the questions posed to Dr. Campbell in the letter could have been asked of him in his deposition at no cost to Petitioner. Therefore, the cost of \$83.40 for Dr. Campbell's fee is denied.

ORDER

¶11 Petitioner's request for costs in the amount of \$2,313.45 is **GRANTED**.

DATED in Helena, Montana, this 17th day of February, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Mr. Chris J. Ragar
Mr. Bradley J. Luck for Mr. Thomas J. Harrington
Submitted: September 16, 2005

⁹ ARM 24.5.342(4)(c).