

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 19

WCC No. 2006-1758

MARTIN HETH, JR.

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER REGARDING APPLICATION FOR COSTS

Summary: Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Rosen; two different services provided by Medical Management Resources; and Petitioner's request for reimbursement of the cost of mediation services from Corette, Pohlman & Kebe. Respondent argues that all of these expenses were incurred after this Court conducted the trial in this matter, and therefore they are not reimbursable costs under ARM 24.5.342.

Held: Respondent's objections are sustained. This Court has previously held that the expert fees of a doctor who did not testify at trial or by deposition and who did not create a report submitted into evidence are not recoverable. This Court has also previously held that the cost of appellate mediation is not a recoverable cost. ARM 24.5.342 does not provide for the reimbursement of costs which Petitioner incurred after the trial and which were not part of the Court's deliberations in reaching a decision in this matter.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Under ARM 24.5.342(6), the Court may award costs not enumerated in ARM 24.5.342(4) if those costs are in accordance with the principles of ARM 24.5.342(3). The costs Petitioner incurred post-trial from a medical management company – which were not submitted into evidence and therefore not considered by the Court in reaching its determination – are not recoverable costs.

Costs: WCC Costs. Under ARM 24.5.342(6), the Court may award costs not enumerated in ARM 24.5.342(4) if those costs are in accordance with the principles of ARM 24.5.342(3). The costs Petitioner incurred post-trial from a medical management company – which were not submitted into evidence and therefore not considered by the Court in reaching its determination – are not recoverable costs.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Petitioner’s half of the expense for a post-trial mandatory appellate mediation conference are not recoverable, even though Petitioner was the appellee and ultimately prevailed on appeal. This Court previously concluded that the appellate mediator’s fee is not a recoverable cost under ARM 24.5.342. *Preston v. Transportation Ins. Co.*, 2005 MTWCC 46, ¶ 5. Furthermore, M.R.App.P. 7(4)(f) unequivocally states that the parties to an appeal “shall share the mediator’s fee and incidental expenses equally.” Therefore, Petitioner cannot recover his share of the fee as a cost under ARM 24.5.342.

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Appellate Procedure - by Section - Rule 7. Petitioner’s half of the expense for a post-trial mandatory appellate mediation conference are not recoverable, even though Petitioner was the appellee and ultimately prevailed on appeal. This Court previously concluded that the appellate mediator’s fee is not a recoverable cost under ARM 24.5.342. *Preston v. Transportation Ins. Co.*, 2005 MTWCC 46, ¶ 5. Furthermore, M.R.App.P. 7(4)(f) unequivocally states that the parties to an appeal “shall share the mediator’s fee and incidental expenses equally.” Therefore, Petitioner cannot recover his share of the fee as a cost under ARM 24.5.342.

Costs: WCC Costs. Petitioner’s half of the expense for a post-trial mandatory appellate mediation conference are not recoverable, even though Petitioner was the appellee and ultimately prevailed on appeal. This Court previously concluded that the appellate mediator’s fee is not a recoverable cost under ARM 24.5.342. *Preston v. Transportation Ins. Co.*, 2005 MTWCC 46, ¶ 5. Furthermore, M.R.App.P. 7(4)(f) unequivocally states that the parties to an appeal “shall share the mediator’s fee and incidental expenses equally.” Therefore, Petitioner cannot recover his share of the fee as a cost under ARM 24.5.342.

¶ 1 Petitioner filed his Application for Taxation of Costs on June 8, 2009.¹ On June 18, 2009, Respondent filed objections to four of the items for which Petitioner applied: (1) a February 25, 2008, fee of \$437.50 to Medical Management Resources; (2) a March 26, 2008, fee of \$1,000.00 to Dr. Rosen; (3) an April 11, 2008, fee of \$351.00 to Medical Management Resources; and (4) an August 1, 2008, fee of \$437.50 to Corette, Pohlman & Kebe.²

¶ 2 On June 26, 2009, Petitioner filed a reply brief to Respondent's objections.³ Strictly speaking, ARM 24.5.342 does not provide for a reply brief. However, if I were to disregard Petitioner's brief while finding Respondent's objections well-taken, Petitioner would reasonably and inevitably raise these same arguments in a motion for reconsideration. Therefore, in the interest of judicial economy I will consider Petitioner's arguments in that light rather than disregarding his reply brief.

¶ 3 Respondent contends that Petitioner should not be allowed to recover the costs for these four items because they were all professional fees incurred after trial was held in this matter on February 7 and 11, 2008. Respondent argues that these items do not meet the criteria of ARM 24.5.342 as recoverable costs because these expenses did not produce evidence or testimony used at trial in assisting the Court in reaching its decision.

¶ 4 Respondent asserts that in the present case, the records of Medical Management Resources were not submitted into evidence and were not considered by the Court in reaching its determination. Therefore, Respondent contends these expenses should be disallowed as recoverable costs. In his application, Petitioner lists these expenses as "Professional Fees" and describes them more specifically as "reimb. comp." and "Medicare Set Aside."⁴ In his brief, Petitioner explains that after this Court ruled in his favor, he began to work on determining how much his judgment was worth so that the parties could evaluate the value of the judgment. Petitioner therefore hired an expert to audit his existing medical bills and determine his Medicare set-aside, and incurred these costs while doing so.⁵

¶ 5 ARM 24.5.342(4) enumerates examples of costs that are generally found to be reasonable. The items enumerated do not encompass the expenses Petitioner incurred

¹ Petitioner's Application for Taxation of Costs, Docket Item No. 62.

² Respondent's Objections to Application for Taxation of Costs, Docket Item No. 63.

³ Petitioner's Brief in Support of Application for Taxation of Costs, Docket Item No. 69.

⁴ Petitioner's Application for Taxation of Costs at Ex. A at 1, Docket Item No. 62.

⁵ Petitioner's Brief in Support of Application for Taxation of Costs at 2, Docket Item No. 69.

from Medical Management Resources. However, under ARM 24.5.342(6), the Court may award items of costs not specifically enumerated in the rule if those costs are in accordance with the principles of ARM 24.5.342(3). Since the expenses Petitioner incurred from Medical Management Resources appear to have been incurred post-trial, and since, as Respondent points out, the records of Medical Management Resources were not submitted into evidence and were not considered by the Court in reaching its determination, I conclude these expenses are not recoverable costs under ARM 24.5.342.

¶ 6 Respondent further points out that this Court has previously ruled that expert fees are not recoverable unless the expert testifies at trial or by deposition,⁶ and has also disallowed recovery of costs for the fees of doctors who neither testified at trial nor by deposition.⁷ Respondent asserts that Dr. Rosen's examination of Petitioner occurred subsequent to trial; Dr. Rosen did not testify at trial or by deposition; and Dr. Rosen's report was not submitted into evidence. Therefore, Respondent argues that Dr. Rosen's \$1,000.00 fee should be disallowed as a recoverable cost. Petitioner argues that Dr. Rosen's evaluation was "absolutely essential" as it allowed him to evaluate the value of the medical issues associated with his claim. While Dr. Rosen may have provided Petitioner with useful information, it was nonetheless information which was not entered into evidence at trial. In light of the case law, I conclude Respondent is correct. Dr. Rosen's fee is not a recoverable cost.

¶ 7 Regarding the fee from Corette, Pohlman & Kebe, Respondent asserts that this bill relates to the mandatory appellate mediation conference in which the parties participated when this case was appealed. Respondent argues that in *Preston v. Transportation Ins. Co.*, this Court concluded that the appellate mediator's fee is not a recoverable cost pursuant to ARM 24.5.342.⁸ Therefore, Respondent argues that this fee should also be disallowed. Petitioner, however, argues that his case is factually distinguishable from *Preston* because, unlike the claimant in that case, Petitioner is not the appellant, and, unlike *Preston*, in the present case, the appellant did not prevail. Petitioner argues that ARM 24.5.342 allows him to recover the cost of reasonable items, and that paying for mandatory mediation is a reasonable cost and therefore should be recoverable under the ARM.

¶ 8 M.R.App.P. 7(2)(a) states that all appeals from this Court are subject to mandatory appellate alternative dispute resolution. Under M.R.App.P. 7(4)(f), the parties "shall share the mediator's fee and incidental expenses equally." While Petitioner would like this Court

⁶ *Galetti v. Montana Power Co.*, 2002 MTWCC 20, ¶ 5.

⁷ *Rau v. Montana State Fund*, 2008 MTWCC 34, ¶¶ 4-6.

⁸ 2005 MTWCC 46, ¶ 5.

to allow him to recover this cost, M.R.App.P. 7(4)(f) clearly provides otherwise. The fee associated with the appellate mediation is not a cost which Petitioner can tax to Respondent.

¶ 9 Having considered the applicable ARM and the case law which Respondent has put before the Court, I agree with Respondent regarding the four costs to which Respondent objects. Petitioner is not entitled to recover his costs for: the February 25, 2008, fee of \$437.50 from Medical Management Resources; the March 26, 2008, fee of \$1,000.00 from Dr. Rosen; the April 11, 2008, fee of \$351.00 from Medical Management Resources; and the August 1, 2008, fee of \$437.50 from Corette, Pohlman & Kebe.

ORDER

¶ 10 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the February 25, 2008, fee of \$437.50 from Medical Management Resources.

¶ 11 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the March 26, 2008, fee of \$1,000.00 from Dr. Rosen.

¶ 12 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the April 11, 2008, fee of \$351.00 from Medical Management Resources.

¶ 13 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the August 1, 2008, fee of \$437.50 from Corette, Pohlman & Kebe.

DATED in Helena, Montana, this 1st day of July, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Patrick R. Sheehy
Kelly M. Wills
Submitted: June 18, 2009