

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 73

WCC No. 9307-6828

CARL LARSON

Petitioner

vs.

CIGNA INSURANCE COMPANY,

Respondent/Insurer for

YELLOWSTONE FORD TRUCK SALES, INCORPORATED

Employer.

ORDER AND JUDGMENT AWARDING COSTS ON APPEAL

Summary: On remand following reversal in claimant's favor, claimant sought costs on appeal. Respondent objected.

Held: Under section 25-10104, MCA, costs on appeal are mandatory unless a new trial is ordered or the judgment was merely modified. Here, the Supreme Court found this Court committed an error of law; the decision was "reversed and remanded." Claimant is entitled to his costs on appeal.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 25-10-104, MCA. Under section 25-10-104, MCA, costs on appeal are mandatory unless a new trial is ordered or the judgment was merely modified. Where the Supreme Court found this Court committed an error of law, and this Court's decision was "reversed and remanded," claimant is entitled to his costs.

Costs: Supreme Court Costs. Under section 25-10-104, MCA, costs on appeal are mandatory unless a new trial is ordered or the judgment was merely modified.

Where the Supreme Court found this Court committed an error of law, and this Court's decision was "reversed and remanded," claimant is entitled to his costs.

This case is on remand from the Supreme Court following reversal of this Court's original decision. In reversing our original decision, the Supreme Court held that this Court committed an error of law in finding that claimant was not entitled to permanent total disability benefits because he was already permanently totally disabled due to a preexisting, non work-related heart condition. Nonetheless, respondent objects to any award of costs on appeal, arguing that the Supreme Court merely modified this Court's decision. The objection is without merit.

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.

Respondent's assertion that the Supreme Court merely modified the judgment of this Court is imaginative but flawed. The Court specifically held that an error of law was committed. Its final statement on the case was, "**Reversed** and remanded." Claimant was the successful party on appeal and is entitled to his costs.

The Petitioner's Memorandum of Costs on Appeal itemizes costs totaling \$522.96. Respondent does not dispute this amount.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT petitioner recover \$522.96 in costs from the respondent.

This ORDER AND JUDGMENT is certified as final for purposes of appeal.

Dated in Helena, Montana, this 19th day of September, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston, III
Ms. Sara R. Sexe