

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9312-6970

MARK ALLEN PETERSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HEIGHTS CONOCO

Employer.

ORDER AWARDING COSTS

Summary: Following successful petition to the Workers' Compensation Court, claimant sought costs including air travel for claimant and his attorney, as well as expert witness fees beyond the statutory \$10 rate for all witnesses.

Held: Costs denied (but see subsequent WCC decisions following adoption of WCC Rule on Costs, ARM 24.5.342 (which include expert witness fees)).

Topics:

Costs: WCC Costs. Costs of air travel for claimant and counsel, and expert witness fees beyond statutory rate for all witnesses, denied as recoverable costs in Workers' Compensation Court (but see subsequent WCC decisions following adoption of WCC Rule on Costs, ARM 24.5.342 (which include expert witness fees)).

On November 23, 1994, this Court issued its Findings of Fact, Conclusions of Law and Judgment, finding in favor of the claimant and awarding costs. On December 12, 1994, Appellant's Verified Bill of Costs was filed in which he sought costs totalling \$1,826.50. State Compensation Insurance Fund (State Fund) objects to petitioner's request for costs for air travel for the claimant and his attorney in the amount of \$313.50 and for expert fees in the amount of \$450. State Fund argues that expert fees are the same as any witness and are limited to \$10 per day.

The issue of expert witness fees was addressed by this Court in ***Kloepfer v. Lumbermens Mutual Casualty Co.***, in its Order Denying Petitioner's Request for Redetermination of Costs issued June 22, 1994. The Court denied expert witness fees in excess of \$10, stating:

Petitioner further argues that ***Witty v. Pluid***, 220 Mont. 272, 273, 714 P.2d 169 (1986), in which the Supreme Court held that expert witness fees are limited to \$10 per day per witness, concerned costs in a district court proceeding and is therefore inapplicable to the Workers' Compensation Court. However, in ***Baeta v. Don Tripp Trucking***, 254 Mont. 487, 839 P.2d 566, (1992), the Supreme Court held that the same cost statute governing district court proceedings (§ 25-10-201, MCA) is applicable to proceedings in the Workers' Compensation Court. In ***Witty*** the Court specifically considered the fees which may be awarded to experts under section 25-10-201. It determined that the section does not permit a fee greater than \$10 because section 26-2-505, MCA, provides that "[a]n expert is a witness and receives the same compensation as a witness" and section 26-2-501, MCA, provides that a witness is entitled to \$10 for each day of attendance at trial.

In ***Thayer v. Hicks***, 243 Mont. 138, 158, 793 P.2d 784 (1990), the Supreme Court discussed litigation costs, writing:

Not all litigation expenses that may properly be billed to a client may necessarily be recovered from the opposing party. Only those costs delineated in sec. 25-10-201, MCA, may be charged to the opposing party unless the item of expense is taken out of sec. 25-10-201, MCA, by a more specialized statute, by stipulation of the parties or by rule of court. ***Luppold v. Lewis***, 172 Mont. 280, 292, 563 P.2d 538, 545 (1977).

...

The prevailing party has the burden of proving that each disbursement that does not fall within the statutory list is within the purview of the statute.

As noted, section 25-10-201, MCA, is applicable to the Workers' Compensation Court. Neither party argues that the disputed costs are governed by a special statute. There is no stipulation of the parties and there is not a Court rule regarding airfares. The petitioner presents no information or proof that the airfares is "within the purview of the statute." The Supreme Court in *Thayer*, supra, denied airfare expense for an expert witness, citing *Powers Manufacturing Co. v. Leon Jacob Ent.* 216 Mont. 407, 412, in which the Court held, "Air fares are not contained in section 25-10-201, MCA, the allowable cost provisions. We hold that air fares are not properly allowable as costs."

Petitioner's request for airfares in the amount of \$313.50 is **denied**. Expert witness fees are limited to \$10 for Psychological Associates and \$10 for Neuropsychology Services.

IT IS HEREBY ORDERED that petitioner shall recover from the respondent the amount of \$1,083 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 11th day of January, 1995.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Thomas J. Lynaugh
Mr. Michael P. Heringer