

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 12

WCC No. 2006-1699

JOHN PORTER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER REGARDING APPLICATIONS FOR COSTS AND ATTORNEY FEES

Summary: Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party. Respondent further objects to Petitioner's application for attorney fees for the work performed on Petitioner's case by a nurse consultant. Finally, Respondent objects to Petitioner's application for fees pertaining to hours spent on the portion of Petitioner's claim specific to his cervical condition which this Court concluded was not compensable.

Held: Respondent's objections to Petitioner's application for costs regarding the travel and lodging expenses Petitioner's counsel incurred in attending trial are sustained as not recoverable under ARM 24.5.342. Respondent's objections to Petitioner's application for costs associated with Dr. Mack's deposition are sustained since Petitioner did not prevail upon the issue to which Dr. Mack testified. For the same reason, Respondent's objections to Petitioner's application for attorney fees associated with Dr. Mack's testimony are sustained. Finally, Respondent's objection to Petitioner's application for attorney fees for work performed on his case by a nurse consultant is sustained because a nurse consultant is not an attorney and therefore her fees cannot be characterized as attorney fees.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Under ARM 24.5.342(6), items of cost not specifically listed in the rule may be awarded by the Court if the Court finds the item to be reasonable in light of the facts and circumstances of the case. In this

case, the Court does not find that Respondent's acquiescence to Petitioner's request for an emergency trial in Helena constitutes circumstances justifying an award of costs for travel and lodging of Petitioner's counsel.

Costs: WCC Costs. Under ARM 24.5.342(6), items of cost not specifically listed in the rule may be awarded by the Court if the Court finds the item to be reasonable in light of the facts and circumstances of the case. In this case, the Court does not find that Respondent's acquiescence to Petitioner's request for an emergency trial in Helena constitutes circumstances justifying an award of costs for travel and lodging of Petitioner's counsel.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Where Petitioner prevailed on some issues, but not on the issue related to his cervical condition, Petitioner cannot recover costs associated with the deposition of a doctor whose testimony related solely to the cervical condition.

Costs: WCC Costs. Where Petitioner prevailed on some issues, but not on the issue related to his cervical condition, Petitioner cannot recover costs associated with the deposition of a doctor whose testimony related solely to the cervical condition.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. A nurse consultant is not an attorney and therefore, although Respondent was ordered to pay Petitioner's attorney fees, Respondent is not statutorily required to pay an "attorney fee" for the services of a nurse consultant.

Attorney Fees: Amount. A nurse consultant is not an attorney and therefore Respondent is not statutorily required to pay an "attorney fee" for the services of a nurse consultant.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Where Petitioner prevailed on some issues, but not on the issue related to his cervical condition, and where one doctor's involvement with Petitioner's case was specific to the causation issue involving the cervical condition, Petitioner cannot recover attorney fees for time his counsel spent working on that doctor's involvement with the case.

Attorney Fees: Amount. Where Petitioner prevailed on some issues, but not on the issue related to his cervical condition, and where one doctor's

involvement with Petitioner's case was specific to the causation issue involving the cervical condition, Petitioner cannot recover attorney fees for time his counsel spent working on that doctor's involvement with the case.

¶ 1 Petitioner filed his Application for Taxation of Costs on November 2, 2007, and his Application for Attorney Fees on November 6, 2007. Respondent filed objections to specific items within each application as set forth below.

Application for Costs

¶ 2 Respondent objects to four specific items for which Petitioner applied for costs. Those items are: mileage for Petitioner's counsel to travel to Helena for trial, lodging for Petitioner's counsel to attend trial in Helena, a deposition fee for Chriss A. Mack, M.D.,¹ and the court reporter fee for taking Dr. Mack's deposition. Regarding the travel and lodging fees, Respondent argues that under the applicable ARM, the expenses counsel incurred for attending trial are not taxable as costs. Regarding the deposition and court reporting fees for Dr. Mack, Respondent argues that Dr. Mack's deposition testimony went entirely to whether Petitioner's cervical condition was compensable and since Petitioner did not prevail on that issue, he is not entitled to recover the costs associated with it.

¶ 3 ARM 24.5.342 enunciates several specific items which generally either are or are not taxable as reasonable costs. It further provides guidance for the Court to determine whether items not listed may be taxable under certain circumstances. Among the items enunciated as generally reasonable costs are: "witness fees and mileage, as allowed by statute, for non-party fact witnesses;"² and "travel and lodging expenses of counsel for attending depositions"³ Respondent argues that if the travel and lodging expenses of counsel for attending trial were a reasonably taxable cost, the ARM would have enunciated it. Petitioner responds that although he requested an emergency trial in Helena, Respondent acquiesced and therefore Respondent should pay for counsel's travel and lodging. Under ARM 24.5.342(6), items of cost not specifically listed in the rule may be awarded by the Court if the Court finds the item to be reasonable in light of the facts and circumstances of the case. I do not find that Respondent's acquiescence to Petitioner's request for an emergency trial in Helena constitutes circumstances justifying an award of costs for travel and lodging of Petitioner's counsel. I therefore sustain Respondent's

¹ Petitioner initially itemized this as a "Medical Report for litigation." In subsequent briefs, both parties stipulated that this item was actually a deposition fee.

² ARM 24.5.342(4)(b).

³ ARM 24.5.342(4)(d).

objection to the costs Petitioner claims for his counsel's travel and lodging to attend trial in Helena.

¶ 4 As to whether Petitioner can recover costs associated with the deposition of Dr. Mack, Respondent argues that Dr. Mack's testimony related solely to Petitioner's cervical condition. Since Petitioner did not prevail on this issue, Respondent contends he is not entitled to recover the costs associated with it. Petitioner concedes that Respondent prevailed on the cervical issue, but insists that Dr. Mack's testimony was an appropriate expert witness fee and therefore was reasonable in light of the facts and circumstances of the case. Regardless of the reasonableness of Dr. Mack's expert witness fee and the court reporter fee associated with his deposition, the fact remains that Dr. Mack testified to the causation of Petitioner's cervical claim. Petitioner did not prevail on this issue. Therefore, Petitioner is not entitled to the costs of Dr. Mack's deposition pursuant to ARM 24.5.342(3).

Attorney Fees

¶ 5 Regarding Petitioner's application for attorney fees, Respondent objects to the payment of any attorney fees as it believes the Court erred in its order, and therefore, attorney fees are not appropriate. Alternatively, Respondent objects to specific portions of Petitioner's itemization. Respondent objects to the request for reimbursement of an "attorney fee" for the services of Ellen Carey, a nurse consultant, on the basis that Respondent is not statutorily required to pay an attorney fee for the services of a nurse consultant. Petitioner responds that his use of a nurse consultant was done with Respondent's concurrence and that the nurse consultant's time was billed at the same rate as the rate applied for in his application for attorney fees. However, the fact remains that a nurse consultant is not an attorney. Therefore, I do not find this item to be properly taxed as an "attorney fee" under § 39-71-611, MCA.

¶ 6 Respondent further objects to specific hours billed by Petitioner's counsel on October 27, December 18, and December 19, 2006, and January 8, 2007, as the corresponding entries indicate that this time was spent working on Dr. Mack's involvement with this case. As Respondent also argued regarding Petitioner's application for costs, Dr. Mack's involvement with the litigation of Petitioner's claim pertained only to the compensability of Petitioner's cervical condition. Since Petitioner's cervical condition was not adjudged compensable by this Court, Respondent argues that Petitioner is not entitled to recover attorney fees incurred pursuing an issue upon which Petitioner did not prevail.

¶ 6 Dr. Mack's involvement with this case was specific to the causation of Petitioner's cervical condition. Since Petitioner did not prevail on this issue, Respondent is not liable for the costs and fees associated with it. For that reason, Respondent's objection to the specific hours spent by Petitioner's counsel on Dr. Mack's testimony is sustained.

ORDER

¶ 7 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the four specific costs enunciated in the parties' briefs.

¶ 8 Respondent's objection to Petitioner's application for attorney fees regarding the hours billed by Ellen Carey, a nurse consultant, is **SUSTAINED**.

¶ 9 Respondent's objection to Petitioner's application for attorney fees regarding the hours billed by Petitioner's counsel for specific hours billed on October 27, December 18, and December 19, 2006, and January 8, 2007, which were spent working on Dr. Mack's involvement with this case is **SUSTAINED**.

DATED in Helena, Montana, this 6th day of March, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Steven S. Carey
Larry W. Jones
Submitted: November 26, 2007