

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 34

WCC No. 2006-1633

SHARON L. RAU

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER REGARDING APPLICATION FOR COSTS

Summary: Respondent objects to two specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Olshansky; and Petitioner's request for the expert fees of Dr. Cory. Dr. Olshansky did not testify at trial or by deposition and did not provide any type of report. Dr. Cory did not testify at trial or by deposition, although his report was entered into evidence.

Held: Respondent's objections to Petitioner's application for costs regarding the expert fees of Drs. Olshansky and Cory are sustained. Dr. Olshansky's fee is disallowed because he did not testify nor was any report or medical record submitted into evidence. Dr. Cory's fee is disallowed because he did not testify at trial or by deposition, and while a report from Dr. Cory was admitted into evidence and relied upon by the Court in reaching its determination in this matter, the Court cannot determine from Petitioner's application what services are included in the fee attributed to Dr. Cory.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Where an expert witness did not testify by trial or by deposition, and his report was not introduced into evidence, his fee is not recoverable as a cost under ARM 24.5.342.

Costs: WCC Costs. Where an expert witness did not testify by trial or by deposition, and his report was not introduced into evidence, his fee is not recoverable as a cost under ARM 24.5.342.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.342. Where an expert witness did not testify by trial or by deposition, but his report was introduced into evidence and was relied upon by the Court in reaching its decision, some of his fee may be taxable as a cost. However, since Petitioner did not break out the fee for the preparation of the expert's report from fees for "consultation," trial preparation, and preparation for deposition testimony, the Court will sustain Respondent's objection to the fee.

Costs: WCC Costs. Where an expert witness did not testify by trial or by deposition, but his report was introduced into evidence and was relied upon by the Court in reaching its decision, some of his fee may be taxable as a cost. However, since Petitioner did not break out the fee for the preparation of the expert's report from fees for "consultation," trial preparation, and preparation for deposition testimony, the Court will sustain Respondent's objection to the fee.

¶ 1 Petitioner filed her Application for Taxation of Costs on June 13, 2008.¹ On June 23, 2008, Respondent filed objections to two of the items for which Petitioner applied: expert fees for Dr. Brian Olshansky in the amount of \$1,950; and expert fees for Jeffrey M. Cory, Ph.D. in the amount of \$2,880.² Petitioner filed a reply to Respondent's objection on June 25, 2008.³ However, ARM 24.5.342, which governs the application for taxation of costs, does not provide for a reply brief. Therefore, Petitioner's reply was not considered by the Court.

¶ 2 Respondent contends that Petitioner's application for costs for Dr. Olshansky's fee of \$1,950 should not be allowed because Dr. Olshansky did not testify at trial or by deposition, and no medical record or report of Dr. Olshansky was offered into evidence in this case. Respondent contends that Petitioner's application for costs for Dr. Cory's fee of \$2,880 should not be allowed because Dr. Cory did not testify at trial or by deposition, although his report was entered into evidence. Respondent argues that under ARM 24.5.342(4)(c), costs that are generally found to be reasonable, and thus

¹ Application for Taxation of Costs, Docket Item No. 35.

² Respondent's Objection to Petitioner's Application for Taxation of Costs, Docket Item No. 36.

³ Petitioner's Reply to Respondent's Objection to Claimed Costs, Docket Item No. 37.

allowable, include expert witness fees, including reasonable preparation time, for testimony either at deposition or at trial, but not at both. In addition to other items enumerated as reasonable costs under ARM 24.5.342(4), ARM 24.5.342(6) provides that items of costs not specifically enumerated in the rule may be awarded by the Court in accordance with the principles of ARM 24.5.342(3).⁴

¶ 3 Respondent further relies upon *Galetti v. Montana Power Company*,⁵ in which this Court held that under ARM 24.5.342, recovery of expert witness fees is permitted only where the expert testifies at trial or by deposition. In *Galetti*, this Court disallowed recovery of an expert witness fee for a vocational expert who did not testify at trial or by deposition. In reaching its decision, this Court noted that it typically allows recovery of an expert's "consultation" or "preparation" time only if the expert actually testifies.⁶

¶ 4 Dr. Olshansky's expert fee is not allowed as a recoverable cost. Dr. Olshansky did not testify at trial or by deposition, nor was any report of his introduced into evidence. Therefore, his fee is not recoverable under ARM 24.5.342.

¶ 5 Dr. Cory's expert fee is somewhat distinguishable. Like Dr. Olshansky, Dr. Cory did not testify at trial or by deposition. Unlike Dr. Olshansky, however, Dr. Cory issued a report which was admitted into evidence. Moreover, Dr. Cory's report was relied upon by this Court in reaching its decision.⁷

¶ 6 In her Application for Taxation of Costs, Petitioner requests \$2,880 for "Plaintiff's Expert Fee, Dr. Jeff Cory."⁸ From Petitioner's request, I cannot ascertain how much of this cost was associated with the preparation of Dr. Cory's report, or how much was "consultation," trial preparation, or preparation for deposition testimony. Since I cannot determine how much, if any, of Dr. Cory's "Expert Fee" is properly taxable as a cost, I am sustaining Respondent's objection to the \$2,880 fee.

⁴ ARM 24.5.342(3) states, "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."

⁵ *Galetti*, 2002 MTWCC 20.

⁶ *Galetti*, ¶¶ 4-6.

⁷ See *Rau v. Montana State Fund*, 2008 MTWCC 26, ¶ 15.

⁸ Application for Taxation of Costs at 2.

ORDER

¶ 7 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the \$1,950 for Dr. Olshansky's fee.

¶ 8 Respondent's objection to Petitioner's application for costs is **SUSTAINED** regarding the \$2,880 for Dr. Cory's fee.

DATED in Helena, Montana, this 10th day of July, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Lynaugh
Michael G. Eiselein
Michael P. Heringer
Submitted: June 23, 2008