IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 27

WCC No. 2006-1531

ALAN RUSSELL

Petitioner

vs.

WATKINS & SHEPARD TRUCKING COMPANY, INCORPORATED

Respondent.

ORDER REGARDING APPLICATION FOR COSTS

Summary: Respondent objects to several specific items of costs which Petitioner seeks as the prevailing party, including deposition costs, expert witness fees, travel and lodging expenses, and copy charges for certain medical records. Respondent argues that many of these items relate only to portions of Petitioner's case where Petitioner did not prevail, and further argues that Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend trial in Helena. Respondent also argues that it cannot be required to pay for independent medical examinations which were performed by expert witnesses prior to rendering their opinions.

Held: Respondent's objections to Petitioner's application for costs regarding items which the Court found did not relate to the issue on which Petitioner prevailed are sustained. Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend the trial in this case. The Court concluded that fees relating to IMEs performed by expert witnesses are recoverable as costs as they were conducted as part of Petitioner's trial preparation and were part of the basis for the opinions the experts reached.

¶ 1 After the Court issued its Findings of Fact, Conclusions of Law and Judgment in this case, Petitioner Alan Russell (Russell) submitted a bill of costs to this Court pursuant to

ARM 24.5.342.[1] Respondent Watkins & Shepard Trucking Company, Incorporated (Watkins & Shepard) responded with objections to several items Russell claimed as recoverable costs.[2] Russell then responded to Watkins & Shepard's objections,[3] and Watkins & Shepard subsequently replied to Russell's response brief.[4, 5]

¶ 2 ARM 24.5.342 does not provide for a response brief to a party's objections, nor does it provide for a reply. Recently, however, I noted that if the Court were to disregard the brief, the party would inevitably raise the same arguments in a motion for reconsideration.[6] In the interest of judicial economy, I considered the response brief in that case, and I do so here as well.

¶ 3 Watkins & Shepard objects to the following costs submitted by Russell:[7]

¶ 3a Deposition Costs: Precision Reporting (Phoenix depositions) – $1,370.85

¶ 3b Expert witness fees:
Erin Bigler, M.D. – $4,375.00
Lindell Weaver, M.D. – $5,580.00
University of Utah – $1,453.00
IHC LDS Hospital (John Foley, M.D.) – $3,429.40
Kerry Stutzman, RN deposition – $195.63

¶ 3c Travel and lodging expenses of counsel for attending depositions:

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[1] Petitioner's Bill of Costs, Docket Item No. 51.

[2] Watkins & Shepard Trucking Company's Objections to Petitioner's Bill of Costs, Docket Item No. 58.

[3] Petitioner's Reply to Respondent's Objections to Bill of Costs, Docket Item No. 60.

[4] Watkins & Shepard Trucking Company's Reply Brief in Support of Objection to Bill of Costs, Docket Item No. 65.

[5] Watkins & Shepard appealed, and Russell cross-appealed, from this Court's Findings of Fact, Conclusions of Law and Judgment and this matter was stayed pending resolution of this appeal. On June 24, 2009, the Montana Supreme Court affirmed and remanded this matter for further proceedings. Accordingly, this matter is now ripe for resolution.

[6] *Heth v. Montana State Fund*, 2009 MTWCC 19, ¶ 2.

[7] *See* Petitioner's Bill of Costs, Docket Item No. 51 and Watkins & Shepard Trucking Company's Objections to Petitioner's Bill of Costs, Docket Item No. 58.

Airfare to, and lodging, in Phoenix – $855.14 [sic][8]
Lodging, Helena – $201.16

¶ 3d Fees and expenses necessary for perpetuation of presentation of evidence offered at trial: Copies of medical records:
Edward H. Charles, M.D. – $20
Health Information Service – $400
Digestive and Liver – $150
Valley Radiologists – $5
The Valley Clinic – $50

¶ 4 Regarding the Precision Reporting fee of $1,370.85, Watkins & Shepard asserts that this cost was incurred when Petitioner deposed Drs. Lanson and Charles and nurse case manager Kerry Stutzman. Watkins & Shepard points out that these witnesses testified regarding Russell's chemical allergies and liver damage which Russell alleged was caused by carbon monoxide exposure, and that Russell did not prevail on those claims. I am not persuaded by Russell's explanation that these depositions were taken not only for the sake of expert testimony, but also to obtain factual testimony about Russell's carbon monoxide exposure. These parties were not witnesses to Russell's carbon monoxide exposure, nor did they offer evidence which the Court relied on in concluding that Russell was exposed to carbon monoxide and that this exposure caused his cognitive impairment. As this Court previously held in *Porter v. Liberty Northwest Ins. Corp.*,[9] a claimant is not entitled to recover the costs associated with the deposition of an expert witness whose testimony regarded an issue upon which the claimant did not prevail. Likewise in the present case, Russell is not entitled to recover the costs associated with the depositions of these witnesses whose testimony regarded issues upon which Watkins & Shepard prevailed. Therefore, Russell's application for costs for the fee of $1,370.85 to Precision Reporting is disallowed. Watkins & Shepard's objection to this cost is sustained.

¶ 5 Watkins & Shepard further objects to the expert witness fees Russell has applied for in regards to Erin Bigler, M.D. Watkins & Shepard points out that Dr. Bigler did not testify at trial or by deposition and draws the Court's attention to *Galetti v. Montana Power Company*,[10] 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*, the

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[8] Watkins & Shepard Trucking Company's Objections states $855.14; Petitioner's Bill of Costs states $825.14.

[9] Porter, 2008 MTWCC 12, ¶ 4.

[10] Galetti, 2002 MTWCC 20.

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.[11] Russell responds that the costs associated with Dr. Bigler are distinguishable because, although Dr. Bigler did not testify, Dr. Bigler's records were introduced into evidence and were crucial to proving Russell's cognitive impairments.

¶ 6 In *Rau v. Montana State Fund*[12], I was presented with a similar situation. In that case, the claimant applied for costs associated with an expert witness who did not testify at trial or by deposition, but whose report was admitted into evidence and relied on by the Court in reaching its decision. However, in that case, I sustained the insurer's objection to the fee, because I could not ascertain from the information provided how much of the requested cost was associated with the preparation of the doctor's report, or how much was "consultation," trial preparation, or preparation for deposition testimony.[13] In the present case, Dr. Bigler did not testify at trial or by deposition, but his report was admitted into evidence and the Court relied upon it in reaching its decision.[14] As in *Rau*, however, I cannot ascertain from the information provided by Russell as to how much of the requested cost was associated with the preparation of the doctor's report. Therefore, I am sustaining Watkins & Shepard's objection to Russell's application for $4,375 for Dr. Bigler's fees.

¶ 7 Watkins & Shepard next objects to $5,580 in fees Russell claims for Dr. Weaver. Watkins & Shepard argues that, although Dr. Weaver testified by deposition, Russell has not demonstrated that the costs he requests meet the standard set forth in ARM 24.5.342(4)(c), which provides that a prevailing party may recover "expert witness fees, including reasonable preparation time, for testimony either by deposition or at trial, but not at both." Watkins & Shepard then alleges that Russell included the medical expenses he incurred when Dr. Weaver conducted an independent medical examination (IME) of him as part of the "expert witness fee" which Russell seeks. Russell responds that the fees he requests in connection with Dr. Weaver do include the examination Dr. Weaver performed. Russell argues that Dr. Weaver's examination was necessary preparation in order for Dr. Weaver to reach his expert opinions. In *Galetti*, this Court noted that typically, it allowed recovery of an expert's "consultation" or "preparation" time only if the expert actually

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[11] *Id.*, ¶¶ 4-6.

[12] *Rau v. Montana State Fund*, 2008 MTWCC 34.

[13] *Id.*, ¶¶ 5-6.

[14] *Russell v. Watkins & Shepard Trucking Co., Inc.*, 2008 MTWCC 36, ¶ 67.

testifies at deposition or at trial.[15] In the present case, Dr. Weaver testified by deposition. As Russell points out, Dr. Weaver's examination of him was conducted as part of his preparation, and Dr. Weaver would not have been able to offer his expert opinion had he not performed the examination. Therefore, his preparation time is recoverable. Watkins & Shepard's objection to this cost is denied.

¶ 8 Watkins & Shepard next argues that the Court should disallow Russell's application for a $1,453. "expert witness fees" from the University of Utah. Watkins & Shepard argues that because "the University of Utah did not testify," this fee is not recoverable under ARM 24.5.342. Watkins & Shepard is correct that Russell failed to offer an adequate explanation to justify how the University of Utah is an allowable expert witness fee. Watkins & Shepard's objection to this cost is sustained.

¶ 9 Watkins & Shepard further objects to the $3,429.40 fee for Dr. Foley for the same reason as it objected to Dr. Weaver's fee. Watkins & Shepard asserts that, although Dr. Foley testified by deposition, Watkins & Shepard believes Dr. Foley's fees relating to the IME he conducted are included in this figure and are not recoverable. As explained above in my discussion of Dr. Weaver's fee, the fees relating to these IMEs are recoverable as costs as they were conducted as part of the claimant's trial preparation and were part of the basis for the opinions the experts reached. Therefore, Dr. Foley's fee is recoverable and Watkins & Shepard's objection to this cost is denied.

¶ 10 Watkins & Shepard also objects to the $195.63 fee for Kerry Stutzman, RN. Watkins & Shepard argues that Russell did not identify Stutzman as an expert witness prior to trial, and that Stutzman's testimony only related to Russell's medical treatment by Drs. Charles and Lanson – and those providers treated Russell for conditions which he did not prove were caused by his carbon monoxide exposure. Russell responds that Stutzman "fits into a different category" because she was hired by Watkins & Shepard as Russell's nurse case manager in Phoenix. Russell asserts that Stutzman was deposed as a fact witness, "but because she has expertise, and also because she had changed employers, she required that she be paid for her appearance at her deposition in Phoenix."[16] Irrespective of whether Stutzman charged for her deposition appearance, she did not testify to the issue upon which Russell prevailed. While Russell argues that Stuzman's testimony relates to his carbon monoxide exposure in general, as well as his initial medical treatment and Watkins & Shepard's handling of the claim, Stutzman had no firsthand knowledge of Russell's carbon monoxide exposure and therefore no factual basis from which to testify to that fact. Moreover, Russell did not prevail in his quest for attorney fees

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[15] *Galetti*, ¶ 6.

[16] Petitioner's Reply to Respondent's Objections to Bill of Costs at 5, Docket Item No. 60.

and a penalty and therefore Watkins & Shepard's handling of the claim is not an issue for which he is entitled to recovery of his costs. Watkins & Shepard's objection to Stutzman's fee is sustained.

¶ 11 Watkins & Shepard next objects to the recoverability of $825.14 in expenses incurred by Russell's counsel in taking depositions in Phoenix. Watkins & Shepard argues that since Russell did not prevail on any of the issues for which his counsel traveled to Phoenix for depositions, these costs are not recoverable. Watkins & Shepard's point is well-taken and its objection to this cost is sustained.

¶ 12 Watkins & Shepard also objects to the recoverability of $201.16 in lodging reimbursement for Russell's counsel's stay in Helena. Because no depositions occurred in Helena, Watkins & Shepard contends this cost must be the lodging fees incurred by Russell's counsel when he traveled to Helena for the trial in this Court. Russell's counsel admits that this is the case, but argues that he is entitled to recover the cost because the case was filed in Billings, but the trial was later moved to Helena and therefore Russell incurred costs for his counsel's travel and lodging. Watkins & Shepard responds that the trial was specially set in Helena for the Court's convenience after multiple continuances which were granted because Russell was not ready to proceed, and therefore Watkins & Shepard should not have to pay for the travel and lodging expenses. Watkins & Shepard further points out that in *Porter*, this Court specifically disallowed the expenses the claimant's counsel incurred in attending a trial set in Helena as an emergency setting.[17] Russell argues that because this case was a special setting, as opposed to an emergency setting, it is distinguishable from *Porter*. However, the fact that the trial was an emergency trial had no bearing on my decision in *Porter* that the costs claimant's counsel incurred in attending trial were not recoverable. I therefore find Russell's argument that this case is distinguishable unpersuasive. Watkins & Shepard's objection to this cost is sustained.

¶ 13 Finally, Watkins & Shepard objects to the costs of the following medical records: Edward H. Charles, M.D. ($20); Health Information Service ($400); Digestive and Liver ($150); Valley Radiologists ($5); and The Valley Clinic ($50). Watkins & Shepard argues that all of these medical records provide evidence for the medical conditions which Russell alleged at trial were related to his carbon monoxide exposure, but on which he did not prevail. Watkins & Shepard asserts that these medical records all come from medical providers in Phoenix, and that none of these providers' records relate to Russell's cognitive impairments. Russell responds that even though he did not prevail on his other claims, these records were necessary evidence so that the Court could review the entire history of his claim, including his initial hospitalization and medical treatment regarding his

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[17] *Porter*, ¶ 3.

carbon monoxide exposure. Russell further argues that the Court should not have to go through medical records page-by-page to determine to which issue each relates. Watkins & Shepard responds that Russell was neither diagnosed with nor treated for cognitive impairment in Phoenix, and that these medical records only confirm Russell's exposure to carbon monoxide in the sense that they record the history of exposure that he related to his medical providers.

¶ 14 In reviewing the findings that I made in the underlying case, I note that although I made findings from these records which were submitted into evidence, all of the findings that I made from information gleaned from these records were findings that led to the conclusion that Russell's various medical conditions were ***not*** caused by his carbon monoxide exposure. As I explained in *Porter*, a claimant cannot recover costs for the issues upon which he did not prevail. Russell prevailed on none of the issues for which he was diagnosed and treated in Phoenix. If Russell had proceeded to trial only on the issue of whether he was exposed to excessive levels of carbon monoxide, causing his cognitive impairment, these records would not have been relevant to my findings and conclusions in the underlying case. Therefore, these records are not properly taxable as costs and Watkins & Shepard's objection is sustained.

ORDER

¶ 15 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $1,370.85 fee to Precision Reporting.

¶ 16 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $4,375 fee for Erin Bigler, M.D.

¶ 17 Watkins & Shepard's objection to Russell's application for costs is **DENIED** regarding the $5,580 fee for Lindell Weaver, M.D.

¶ 18 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $1,453 fee for University of Utah.

¶ 19 Watkins & Shepard's objection to Russell's application for costs is **DENIED** regarding the $3,429.40 fee for IHC LDS Hospital (John Foley, M.D.).

¶ 20 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $195.63 fee for Kerry Stutzman, RN.

¶ 21 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $825.14 fee for airfare to, and lodging, in Phoenix for Russell's counsel.

¶ 22 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the $201.16 fee for lodging in Helena for Russell's counsel.

¶ 23 Watkins & Shepard's objection to Russell's application for costs is **SUSTAINED** regarding the fees for copies of medical records for: Edward H. Charles, M.D. ($20); Health Information Service ($400); Digestive and Liver ($150.00); Valley Radiologists ($5); and The Valley Clinic ($50).

DATED in Helena, Montana, this 17th day of August, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Edmiston
Leo S. Ward
Submitted: August 12, 2008