

**OPINION
67-348**

April 24, 1967 (OPINION)

Mrs. Agnes Geelan

Chairman

Workmen's Compensation Bureau

RE: Workmens Compensation - Attorneys Fees - Definition of Costs

This is in response to your letter in which you recite some basic facts resulting in court actions. They may be summarized as follows:

An employee in course of employment was fatally struck by a train while operating a motor vehicle through or on a railroad crossing. His widow brought a third party action in said district court. The district court dismissed the action, whereupon the case was appealed to the United States Court of Appeals. The Court of Appeals remanded the case to the district court for a new trial. The widow has now submitted an itemized statement of the costs arising out of the first trial and the appeal.

You then call our attention to section 65-01-09, as amended, of the North Dakota Century Code and ask the following questions:

1. Does the word "cost" as cited in that section mean all costs or taxable costs?
2. Does the term "cost" apply to appeals? If so, does it include all costs or only taxable costs?

Section 65-01-09, as amended, as is material here, provides in part as follows:

* * * The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or his dependents, or the employer as provided above and the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee, when such costs are incurred. Should there be no recovery of damages in the action this shall be a cost of the bureau to be paid from the bureau general fund. When there is recovery of damages in the action the costs of the action, exclusive of attorneys fees, shall be prorated and adjusted on the percentage of the total subrogation interest of the bureau recovered to the total recovery in the action. The bureau shall pay attorney fees to the injured employee's attorney from the bureau general fund as follows:

1. Twenty percent of the subrogation interest recovered for the bureau when legal action is not commenced;
2. Twenty-five percent of the subrogation interest recovered

for the bureau when action is commenced and settled before judgment;

3. Thirty-three and a half percent of the subrogation interest recovered for the bureau when recovered through judgment.

The above provisions as to costs of the action and attorney fees is effective only when the injured employee advises the bureau in writing the name and address of his attorney, and that he has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages."

It should be observed that the North Dakota Century Code contains a chapter, 28-26, which treats the subject of costs rather exclusively. The statutory provisions relating to costs as found in chapter 28-26 are costs which are normally referred to as "taxable costs." The provisions of said chapter apply to all actions, including third party actions, before the courts of this state. Actions before the federal courts are governed by the federal rules of procedure. Basically and generally, costs are allowed by statute or the rules of procedure. Where a question arises as to the amount of costs or which costs may be taxed or allowed, it is customarily submitted to the court for a determination. The term "costs" as used in section 65-01-09 does not appear as a work of art. It therefore takes on the meaning ascribed to such term. The dictionary defines the term "cost" to mean as follows:

1. the amount of money, time, labor, etc. required to get a thing; price; expenditure.
2. loss; sacrifice; detriment.
3. in law, (a) the sum fixed by law, or allowed by the court, for expenses of a lawsuit, usually charged against the party losing; (b) fees paid to an attorney or counsel."

(Webster's New Twentieth Century Dictionary Unabridged.)

By setting up the allowance or allocation of costs where existing statutes already allow for taxable costs, a strong presumption exists that the term "cost" is used in a different sense. The courts have recognized that a word will take on its full and true meaning from the context in which it is used. That portion of section 65-01-09, which provides: "* * * If the action is brought by the injured employee or his dependents, or the employer as provided above and (sic) the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee, when such costs are incurred.", strongly suggests that the term "costs" refer to other than taxable costs because the taxable costs would be recoverable from the losing party under the provisions of chapter 28-26. If the quoted portion were to allocate recoverable costs (taxable costs) instead of providing who shall pay the costs, a different conclusion might be reached. The term "cost" in the following provision in the same section, "* * * Should there be no recovery of damages in the action this shall be a cost of the bureau to be paid from the bureau general fund.", also suggests that the cost refers to something other than taxable cost,

because if the reference were to taxable costs the same would be charged against the losing party, which would be either the bureau, the claimant or the employer and would be covered under the provisions of chapter 28-26.

The exclusion of attorney fees from costs also suggests that the term embraces more than taxable costs. If it meant only taxable costs, there would be no necessity in making the exclusion because the same would have been excluded under chapter 28-26.

We must also be mindful of the purpose and result of a third party action under section 65-01-09. The bureau in each such action has a potential subrogation right to the extent of fifty percent of the damages recovered up to the maximum amount paid or to be paid in compensation or benefits. The bureau in each instance is a real party of interest. The subrogation rights of the bureau prior to the 1965 amendment were one hundred percent. It is to the bureau's benefit to bring a successful action.

It is also a known fact that "statutory" costs under chapter 28-26 fall considerably short of the actual "out of pocket" expenses, not including attorney fees, in almost every lawsuit. It would be grossly unfair to expect the employee or employer to take on the risk of an action and to permit the bureau to participate in the costs only when the action is successful. This inequity was recognized and a specific provision is made for the bureau to bear the cost if the action is unsuccessful by the following language: "* * * Should there be no recovery of damages in the action this shall be a cost of the bureau to be paid from the bureau general fund." (section 65-01-09.) If the legislature had intended said term to mean "taxable costs" it could have so described same or, in the alternative, it could have referred to chapter 28-26.

It is therefore our opinion that the term "costs" as used in section 65-01-09 means all costs and does not mean only those costs mentioned in chapter 28-26 or, as you refer to them, as "taxable costs."

As to appeals, the statute is silent; however, recognizing the interest the bureau has in appeals and the potential benefit it might derive from the result of an appeal, it would seem that this is a matter of negotiation by exercising good, sound judgment. This would be particularly true at the time the appeal is under discussion or where a determination is made whether or not an appeal should be taken. At such time the ultimate success of the appeal would necessarily have to be taken into consideration. Frivolous appeals would, of course, not be recognized. In many, if not in most instances, the employee could not afford the cost of an appeal. However, when an appeal is taken successfully, a different situation exists. We do not believe that the bureau should be permitted to enrich itself at the expense of an employee. The ends of justice would be more fully met if the bureau on successful appeal shared the costs on the same basis as it does on the original action. The costs of appeal involve more than statutory costs. The preparation of the record, including the printing of the transcript, reproduction of exhibits, etc., by far exceed what is commonly referred to as "statutory costs."

It is therefore our further opinion that the bureau may negotiate to assume part or all the costs of an appeal and pay said amount regardless of the outcome of the appeal. However, where the action is successful, it is our further opinion that the bureau in the absence of an agreement would be obligated to pay at least fifty percent of the costs, excluding attorney fees. It would be only just and equitable for the bureau to pay fifty percent of all the costs on all appeals when the appeal is successful. The term "costs" in this instance would again mean all costs and not only those costs which are normally referred to as taxable costs.

HELGI JOHANNESON

Attorney General