

* * * * *

JONATHAN M. KEUL,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,
 Respondent.

Case No. 87-0052-PC-ER

* * * * *

RULING ON
MOTION FOR ORDER
TO RESPONDENT TO PAY
EXPERT WITNESS FEES

This matter is before the Commission on complainant's "Motion for Order to Respondent to Pay the Fees Incurred in its Deposition [of Complainant's Expert Witness" filed March 18, 1992. Both parties have filed briefs.

The factual background of this motion is that after complainant named Helen Marks Dicks as an expert witness, respondent deposed Ms. Dicks for a total of eight hours and then refused to pay a bill tendered by Ms. Dicks for expert witness fees at the rate of \$125/hour. It appears that the deposition of Ms. Dicks took place by stipulation (i.e., in the absence of Commission order) that did not include any provision with respect to such fees.

Complainant grounds his motion on the provisions of §804.01, Stats.:

(2) Scope of discovery. Unless otherwise limited by order of the court in accordance with the provision of this chapter, the scope of discovery is as follows:

(d) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under par. (a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

1. A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3 concerning fees and expenses as the court may deem appropriate.

* * *

3. Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under the last sentence of subds. 1 and 2; and with respect to discovery obtained under the last sentence of subd 1, the court may require . . . the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. (emphasis supplied)

Respondent has raised a number of contentions in opposition to this motion. However, since there is a dispositive threshold gap in complainant's showing, the Commission will not address the other points.

Pursuant to §804.01(2)(d)3., Stats., cited above, a prerequisite to the requirement of payment of the fees of the opposing party's expert witness is (as relevant here) that the expert is "responding to discovery under the last sentence of subd. 1..." Subdivision 1 provides:

1. A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3 concerning fees and expenses as the court may deem appropriate. (emphasis added).

Therefore, in order to constitute discovery under the last sentence of subdivision 1., the discovery must occur "[u]pon motion" and by "order." In this case, there was neither a motion nor an order.

Complainant asserts that the "fact that the parties stipulated to Respondent's deposition of Complainant's expert witness does not eliminate Respondent's obligation to pay the expert for the time spent in deposition." However, complainant cites no authority for this assertion which appears to be at odds with the plain language of the rule cited above. In Matthews v. United States, 756 F. Supp. 511, 515 (D. Kan 1991), the Court addressed a similar issue under the parallel federal rule provision as follows:

An order requiring payment of fees under Rule 26(b)(4)(c) is entered only where discovery is conducted pursuant to Rule 26(b)(4)(A)(ii) or Rule 26(b)(4)(B).


There is no motion of record requesting discovery under Rule 26(b)(4)(A)(ii). The court is without legal authority under Rule 26(b)(4)(C) to order payment of fees and expenses incurred in taking the deposition of plaintiff's expert witness. Presumably, the deposition was taken upon the parties' agreement subject to whatever conditions and terms that were reached. (citations omitted)

The Commission must deny this motion for the same reason.

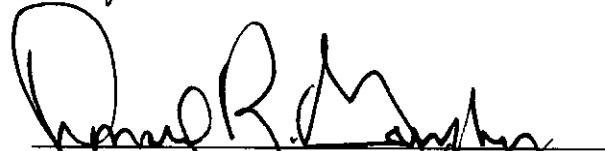
ORDER

Complainant's motion for an order directing respondent to pay Ms. Dicks' expert witness fees, filed March 18, 1992, is denied.

Dated: May 14, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner