Benassi v. Skyline Corporation (May 3, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Richard Benassi	)	Opinion No. 31-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Skyline Corporation	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. U-06588

Pretrial conference on November 15, 2004
Hearing held in Montpelier on April 8, 2005
Record Closed on April 25, 2005

APPEARANCES:

Joseph C. Galanes, Esq., for the Claimant
Christopher McVeigh, Esq., for the Defendant

ISSUE:

Is the meal allowance given the claimant in the twelve weeks prior to his injury part of his average weekly wage?

EXHIBITS:

Joint I: Manual Checks Report

Claimant's 1: IRS Publication re: reporting of expenses

FINDINGS OF FACT:

1. At all time relevant to this claim, claimant was an employee and Skyline his employer within the Vermont Workers' Compensation Act.

2. As a field technician for Skyline, claimant traveled throughout the northeastern United States performing work on prefabricated houses built by Skyline.

3. Since field technicians work away from home, Skyline issues expense advances to each technician weekly. From that advance, the technician paid for work-related expenses such as lodging, additional materials and meals. Unused portions of the advance were to be returned to the manager along with report sheets and receipts, except that receipts were not required for meals.

4. Meals were reimbursed at $7.00 per day for breakfast, $7.00 for lunch, and $16.00 for dinner, although the technician was to return the allowance for particular meal if he returned home before that meal. For example, if the technician returned home before 5:00 on a given day, the dinner allowance for that day was to be returned. However, if only part of a meal allowance was spent on a particular meal, for example $5.00 for lunch, the difference did not have to be returned. When not on the road, technicians do not receive any meal allowance.

5. On October 26, 2003, claimant was injured when he fell down stairs at a customer's home in New Hampshire. As a result, he was temporarily disabled, entitling him to indemnity benefits, which are calculated from his average weekly wage.

6. Claimant speculated that he spent approximately one half of the meal allowance when he was on the road. When he was on the road for a full week, that allowance was $150.00. He considered the meal allowance as part of his pay, although he did not claim it as income on tax returns and the employer did not pay payroll taxes on that amount. Including the meal allowance in claimant's average weekly wage would increase it by $125.83 a week.

7. Claimant has a contingency fee agreement with his attorney and seeks an award of fees representing 20% of the award.

CONCLUSIONS OF LAW:

1. Temporary disability benefits are to be calculated as a percentage of the average weekly wage, "which shall be computed in such a manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury…." 21 V.S.A. § 650(a).

2. Claimant argues that the money for the meal allowance should have been included on claimant's W-2 as wages and the defendant should have paid payroll taxes on that amount. He also cites cases in other jurisdictions for the proposition that allowances for meals are properly included as wages, regardless of the tax status of those funds. In support of this position, claimant cites to IRS criteria for an accountable plan that would be met only when claimant was traveling for a 24-hour period. Internal Revenue Service Publication 463 (2003), Travel, Entertainment, Gift and Car Expenses at 3. Because defendant paid claimant a meal allowance even when he was not away overnight, claimant argues that the sums claimant received fail to meet the IRS criteria for an "accountable plan" and must therefore be included as wages.

3. Under Vermont law, "[w]ages includes bonuses and the market value of board, lodging, fuel and other advantages which can be estimated in money and which the employee received from the employer as part of his remuneration, but does not include any sum paid by the employer to his employee to cover any special expenses entailed on the employee by the nature of his employment." 21 V.S.A. § 601(13)

4. "The overall goal in statutory interpretation is to implement the Legislature's intent. We will first look to the statute's terms and apply the plain language if it is unambiguous. In addition, we look to the statute as a whole and 'its consequences and effects to reach a fair and rational result.'" *Farris v. Bryant Grinder Corp.* 2005VT 5 ¶ 8 (citations omitted).

5. The meal allowance was clearly a sum paid to the claimant for special expenses and therefore excluded from the definition of wages under § 601(13). The expense was allowed only for the time claimant was on the road when it was expected that he would eat meals away from home. On those days when he arrived home before 5:00 p.m., the allowance for dinner that day had to be returned. The meal advance meets the statutory exception for "special expenses entailed on the employee by the nature of his employment." Id. Accordingly, it was properly excluded from the average weekly wage calculation under the plain language of the statute.

6. Looking at the statute as a whole also warrants exclusion. Temporary total disability benefits under § 642 are wage replacement benefits awarded for one's loss of earning capacity. See *Orvis v. Hutchins*, 123 Vt. 18 (1962). When one is employed in the concurrent employment of another insured employer, those wages are included in the computation under § 650, a reflection of the loss in earned wages. In contrast, the meal allowance sums claimant seeks in this case were not earned. In fact, were he performing the same work without the need for travel, he would receive no meal allowance. Even if the IRS interpretation is as claimant suggests, the clear intent of the Vermont Workers' Compensation Act is to exclude special expenses, including meal allowances.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, the claim to include meal allowances in average weekly wage is DENIED.

Dated at Montpelier, Vermont this 3rd day of May 2005.

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Laura Kilmer Collins
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.