IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 69

WCC No. 2003-0827

MARTIN McLAUGHLIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: In 2001 the employer provided its employees with an option of characterizing $5 an hour of the pay they were already receiving as travel reimbursement. Claimant elected to do so. He was thereafter injured. At that time he was receiving $14 an hour, $5 of which was characterized as travel reimbursement for going to and from work. Had claimant not made the earlier election he still would have received the $14 an hour and it would have all been characterized as wages. Nonetheless, the insurer refused to include the $5 an hour in computing the claimant's wages for benefit purposes.

Held: The insurer must include the full $14 an hour in computing the claimant's wages for purposes of benefits. Travel pay can be excluded from wages only if it is in fact travel pay and it meets the requirements of ARM 24.29.720. The $5 at issue in this case did not meet the requirements since in was in lieu of and replaced claimant's customary wages. Moreover, the amount bore no direct or indirect relationship to the claimant's actual expenses for traveling to and from work and was not computed in accordance to any of the methods permitted under ARM 24.29.720.

Topics:

> **Wages: Travel Pay.** Amounts characterized as travel pay may be excluded from wages in determining compensation only if they meet the criteria and requirements of regulations adopted by the Department of Labor and Industry pursuant to section 39-71-123, MCA. Those regulations are found in ARM 24.29.720.

Wages: Travel Pay. Where claimant was receiving $14 an hour and $5 of that amount was characterized as travel reimbursement, the $5 cannot be excluded in computing his wages where he would have received the same $14 an hour even if he had not agreed to characterizing part of the compensation as travel pay. To be excludable travel pay, the amount must not replace the employee's customary wage. ARM 24.29.720(1)(d).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123, MCA (2001-2003). Where claimant was receiving $14 an hour and $5 of that amount was characterized as travel reimbursement, the $5 cannot be excluded in computing his wages where he would have received the same $14 an hour even if he had not agreed to characterizing part of the compensation as travel pay. To be excludable travel pay, the amount must not replace the employee's customary wage. ARM 24.29.720(1)(d).

Constitutions, Statutes, Regulations, and Rules: Administrative Regulations: ARM 24.29.720. Where claimant was receiving $14 an hour and $5 of that amount was characterized as travel reimbursement, the $5 cannot be excluded in computing his wages where he would have received the same $14 an hour even if he had not agreed to characterizing part of the compensation as travel pay. To be excludable travel pay, the amount must not replace the employee's customary wage. ARM 24.29.720(1)(d).

Wages: Travel Pay. To be excludable from wages used for purposes of determining workers' compensation benefits, employee travel reimbursement must approximate the employee's actual travel expenses and be calculated using one of the methods approved by the Department of Labor and Industry in ARM 24.29.720(2).

Constitutions, Statutes, Regulations, and Rules: Administrative Regulations: ARM 24.29.720. To be excludable from wages used for purposes of determining workers' compensation benefits, employee travel reimbursement must approximate the employee's actual travel expenses and be calculated using one of the methods approved by the Department of Labor and Industry in ARM 24.29.720(2).

¶1 The trial in this matter was held on December 4, 2003, in Kalispell, Montana. Petitioner, Martin McLaughlin, was present and represented by Mr. David W. Lauridsen. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

Also present were Mr. Steve Norred, the president of Steve Norred Construction, Incorporated, which employed claimant and two other employees.

¶2 The issue presented for determination in this case is whether $5 an hour of compensation received by claimant at the time of his injury is travel pay which should be excluded in determining his wages for purposes of compensation. Claimant also requests a penalty.

¶3 Prior to the commencement of trial, the Court and counsel discussed the case and determined that it could be submitted for decision based on the two exhibits, the depositions of Steve Norred and Martin McLaughlin, and a short stipulation of facts. I ruled that the $5 designated as travel pay at the time of claimant's injury did not meet the criteria for travel pay under Department of Labor and Industry (Department) regulations. I reserved for further consideration whether all or only part of the $5 should be included in wages for purposes of benefits.

¶4 Having further considered the latter matter, I now enter the following findings of fact, conclusions of law and judgment.

FINDINGS OF FACT

¶5 On November 21, 2002, while working for Steve Norred Construction, Incorporated (Norred Construction), claimant was injured. The parties agree that claimant was in the course and scope of his employment.

¶6 At the time of the claimant's injury, Norred Construction was insured by Liberty.

¶7 Liberty accepted liability for claimant's November 21, 2002 injury, and has paid compensation benefits.

¶8 At the time of claimant's injury he was receiving $14 an hour for his work, however, $5 of that amount was designated as travel pay. The designation was made pursuant to an election allowed by Norred Construction since February 2001. In February 2001, claimant was earning $12 an hour, however, at that time he was allowed to elect to designate $5 an hour of his hourly rate as travel pay. Other employees were allowed to make the same election.

¶9 Claimant asserts in his deposition that he was not given an option with regard to the $5 an hour travel pay designation, while the employer says that he was. I indicated to counsel, and reaffirm here, that the voluntariness of claimant's election is immaterial to my decision in this case. Both parties agree that absent the election, claimant's entire pay would have been designated as wages, which at that time was $12.

¶10 In any event, $5 an hour of claimant's pay was thereafter designated as travel pay.

¶11 After February 2001, the claimant received an increase in wages so that at the time of his injury his pay was $14 an hour, $9 of which was designated for payroll purposes as wages and $5 as travel pay. The parties agree that had claimant not elected to receive $5 as travel pay the entire $14 an hour would have been designated as wages for payroll purposes.

¶12 Claimant and other employees electing to receive $5 an hour as travel pay were not required to track their travel expenses to and from job sites or to submit receipts or mileage reports to Norred Construction.

¶13 At the time of the claimant's injury, he was working on a job in Bigfork, Montana. His travel from his home to the job site totaled approximately 70 miles round trip. Actual mileage to and from job sites varied by the job, however, most of Norred Construction's jobs are in the town of Bigfork. Claimant lives in Hungry Horse.

¶14 Two other employees of Norred Construction elected the $5 travel pay option, while a third employee elected to have his entire pay characterized as wages. Of the two other employees electing travel pay, one lived in the Swan, approximately 30 miles from Bigfork and the other in Whitefish, approximately 40 miles from Bigfork.

¶15 In computing the claimant's wages for benefit purposes, Liberty used $9 an hour. It has refused to include the $5 an hour which was designated as travel pay. Its refusal is based on section 39-71-123(2)(a), MCA (2001), which provides for the exclusion of travel reimbursement from wages, and my decision in *Borglum v. Hartford Insurance Company of the Midwest,* 2002 MTWCC 16.

CONCLUSIONS OF LAW

¶16 Computation of wages for benefit purposes is governed by section 39-71-123, MCA. The 2001 version of the section applies since that was the version in effect at the time of the claimant's injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶17 Section 39-71-123, MCA (2001), provides in relevant part:

39-71-123. Wages defined. (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. . . .

(2) The term "wages" does not include any of the following:

(a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other expenses, as set forth in department rules;

. . .

Liberty relies on subsection (2)(a). That subsection, however, provides for the Department to promulgate rules regulating such expenses, including travel expenses.

¶18 The apparent purpose of subsection (2)(a)'s grant of rule making power is to give the Department the authority to establish guidelines and limitations assuring that reimbursements or allowances which are exempted from wage calculations are *in fact* for meals, lodging, travel, and similar out-of-pocket employee expenses and not merely disguised wages. In fact, the Department has promulgated rules which satisfy that purpose. ARM 24.29.720 provides:

> 24.29.720 PAYMENTS THAT ARE NOT WAGES--EMPLOYEE EXPENSES.
>
> (1) Effective January 1, 1993, payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred in the course and scope of employment are not wages if all of the following are met:
>
> (a) the amount of each employee's reimbursement is entered separately in the employer's records;
>
> (b) the employee could reasonably be expected to incur the expenses while traveling on the business of the employer;
>
> (c) the reimbursement is not based on a percentage of the employee's wages nor is it deducted from wages; and
>
> (d) the reimbursement does not replace the customary wage for the occupation.
>
> (2) Reimbursement for expenses may be based on any of the following methods that apply:
>
> (a) for actual expenses incurred by the employee, to the extent that they are supported by receipts;
>
> (b) for meals and lodging; at a flat rate no greater than the amount allowed to employees of the state of Montana pursuant to 2-18-5012-18-501 (1) (b) and (2) (b),

MCA for meals, and 2-18-5012-18-501(5), MCA for lodging, unless, through documentation, the employer can substantiate a higher rate;

(c) for mileage, at a rate no greater than that allowed by the United States internal revenue service for that year, provided that the individual actually furnishes the vehicle;

(d) for equipment other than vehicles, the reasonable rental value for that equipment, which for individuals involved in timber falling may not exceed $22.50 per working day for chain saw and related timber falling expenses;

(e) for heavy equipment, including but not limited to semi-tractors or bulldozers, the reasonable rental value may not exceed 75% of the employee's gross remuneration;

(f) for drivers utilized or employed by a motor carrier with intrastate operating authority, meal and lodging expenses may be reimbursed by either of the methods provided in (2)(a)or (b) for each calendar day the driver is on travel status; or

(g) for drivers utilized or employed by a motor carrier with interstate operating authority, meal and lodging expenses may be reimbursed by the methods provided in (2)(a) or (b), or by a flat rate not to exceed $30.00 for each calendar day the driver is on travel status.

¶19 The four requirements in subsection (1) are in the conjunctive, thus in this case, all four requirements must be met for the $5 an hour to be excluded in computing claimant's wages. The fourth requirement - subsection (1)(d) is clearly not met. When the election of travel pay was implemented in 2001 the $5 an hour was merely subtracted from the pay claimant and his electing coworkers were already receiving. Moreover, had claimant not elected the travel pay option, or had he revoked it, he still would have received $14 an hour and that the full $14 would have been included in computing his wages for workers' compensation purposes. Thus, the $5 reimbursement in fact replaced *claimant's* customary wage.

¶20 Liberty's attorney pointed out in discussion at trial that the "customary wage for the occupation" referred to in subsection (1)(d) is not otherwise defined. However, in this case the employer's own payment method, both before and after February 2001, establishes that the claimant's total hourly pay was the customary pay for his position. Claimant's pay is the best and only evidence of customary pay even if that term is construed to mean

customary pay in the industry in general rather than for that particular employer. I need not decide what evidence would be necessary to establish customary wages in a case where the employer has always maintained a travel pay component and does not allow employees to elect how it is characterized.

¶21 It is also doubtful that the $5 meets the requirement of subsection (1)(b) that "the employee could reasonably be expected to incur *the expenses* while traveling on the business of the employer." The subsection refers to "the expenses", indicating that the reimbursement must approximate actual travel expenses. The amount here, however, was paid on an hourly basis, which has no tie whatsoever to the mileage traveled to and from work. Moreover, the flat rate applied irrespective of the distance the employees resided from the job sites. Thus, there is no direct or even indirect correlation between the reimbursement and travel expense.

¶22 I recognize that claimant and his co-employees incurred expenses in traveling to and from work for such things as gasoline, vehicle maintenance, and vehicle depreciation. I wondered whether some portion of the $5 an hour might therefore be excludable from wages, perhaps utilizing Internal Revenue Service or State of Montana employee mileage reimbursement rates and the actual mileage claimant traveled to and from work. However, after further consideration, I have determined that neither the insurer nor I can make such allocation. My conclusion is based on my plain reading of subsection (1) of ARM 24.29.720, which requires that all four of the criteria of the subsection be met for exclusion of amounts characterized as reimbursement for employee travel expenses. Since the criteria were not met, the payments cannot be excluded.

¶23 Further, subsection (2) provides alternative methods for calculating travel and similar reimbursement which otherwise meets the criteria laid out in subsection (1). None of the permissible methods was used in this case.

¶24 I therefore conclude and hold that the entire $14 an hour claimant was receiving at the time of his injury must be included as wages in computing his benefits.

¶25 *Borglum*, cited by Liberty as compelling a different result, is inapposite. The question in *Borglum* was whether claimant was in the course and scope of his employment when traveling to work at a job site many miles from his home. In that case, I found that the employer's payment of $20 a day for travel to the distant job site was in addition to his normal hourly pay. Although the $20 reimbursement may well have been inadequate to reimburse claimant for his actual travel expenses, I held that it nonetheless constituted travel reimbursement, thereby satisfying the requirements of section 39-71-407(3)(a), MCA (1999), for claimant's travel to be within the course and scope of employment.

¶26 The issue in this case does not involve a course and scope issue, indeed claimant was injured while working at the job site, not while traveling. Moreover, this case involves a separate and distinct statute not at issue in *Borglum*. I must apply that statute as written, as I did the statute in *Borglum*.

¶27 Nonetheless, Liberty's interpretation of *Borglum* as permitting exclusion of the $5 an hour was not unreasonable. In *Borglum,* as in this case, there was no attempt to tie the travel reimbursement to actual travel expenses. Probably the reimbursement did not satisfy ARM 24.29.720 since it was not computed pursuant to one of the methodologies enumerated in subsection (2) of ARM 24.29.720. That said, the issue of whether a claimant is receiving some travel pay such that the travel is within the scope of employment is different from the question of whether the travel pay can be excluded from wages in determining compensation.

¶28 Since Liberty did not act unreasonably, claimant is not entitled to a penalty or attorney fees. §§ 39-71-612, -2907, MCA.

JUDGMENT

¶29 Claimant's wages for purposes of determining benefits was $14 an hour. Liberty shall recalculate his benefits based on that wage and pay claimant any additional benefits due him based on the recalculation. If the parties cannot agree on the amount due claimant, they shall inform the Court and a further hearing will be held to determine the proper amount.

¶30 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶31 Claimant is not entitled to attorney fees or a penalty.

¶32 This JUDGMENT is certified as final for purposes of appeal.

¶33 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 9th day of December, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Larry W. Jones
Submitted: December 4, 2003