
In the Matter of the Compensation of
JEFFERY P. SPARKS, Claimant
WCB Case No. 10-05303
ORDER ON REVIEW
J Michael Casey, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Riechers's order that directed it to recalculate claimant's temporary disability benefits. On review, the issue is the rate of temporary total disability (TTD).

We adopt and affirm the ALJ's order with the following supplementation.

Claimant, a master mason from California, worked on two projects in Oregon in 2008-2009. Specifically, from June through September 2008, he worked on a project in Corvallis, and from October 2008 through his date of injury in February 2009, he worked on a project in Portland. For the Corvallis project, he was paid a daily "subsistence pay" of \$76, which was in addition to his hourly wage. (Tr. 13-15; Exs, A, B). He was also paid, on one occasion, \$12 for "travel pay." (Tr. 18-19; Ex. B). For the Portland project, he received a monthly "subsistence pay"/"travel allowance" of \$600, which was also in addition to his hourly wage. (Tr. 17-18; Ex. B). Each time that claimant was paid, the subsistence pay was included with the hourly-wage pay in a single paycheck.¹ (Tr. 18).

Claimant received the same subsistence pay for each of the projects regardless of any expenditures made during any particular pay period. (Tr. 16-17). He was not required to submit receipts and was not reimbursed based on his expenditures. (*Id.*) Once he became disabled, the subsistence pay ceased. (Tr. 18).

In calculating claimant's average weekly wage (AWW) and TTD rate, SAIF did not include the subsistence pay or one-time travel pay. Claimant requested a hearing.

¹ The one-time "travel pay" was also included in one check.

The ALJ found that the subsistence and travel pay were “wages” within the meaning of ORS 656.210(1) and OAR 436-060-0025(5)(c). Consequently, the ALJ directed SAIF to recalculate claimant’s TTD rate. In reaching that conclusion, the ALJ found the facts analogous to those in *David C. McKee*, 47 Van Natta 2028 (1995), *aff’d without opinion*, 142 Or App 595 (1996).

On review, SAIF contends that the subsistence and travel pay are not considered part of claimant’s wage because that pay reflects “[e]xpenses incurred due to the job and reimbursed by the employer * * *.” See OAR 436-060-0025(5)(c). SAIF further contends that *McKee* is inapposite because the “per diem” pay in that case was not a “reimbursement for expenses,” whereas the subsistence and travel pay are such a reimbursement. We disagree with SAIF’s contentions, reasoning as follows.

Claimant’s TTD rate is based on his wage at the time of injury. OAR 436-060-0025(1).² “Wages” are defined as “the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.” ORS 656.005(29). In other words, wages are measured by what the worker was contractually entitled to receive as a result of a valid, operative, and binding agreement. *Anderson v. United Airlines*, 207 Or App 493, 496 (2006); *Elwood M. Newlander*, 58 Van Natta 2705, 2706 (2006).

However, wages do not include “[e]xpenses incurred due to the job and reimbursed by the employer.” OAR 436-060-0025(5)(c). Thus, whether claimant’s wages include the subsistence and travel pay depends on whether that pay was to recompense claimant’s services or to reimburse claimant’s work expenses. *Newlander*, 58 Van Natta at 2706. To qualify as a “reimbursement” of an “expense incurred due to the job,” a payment must “repay an equivalent amount already expended.” *Id.*; *Jack W. VanDolah*, 49 Van Natta 592, 594 (1997). “In other words, if a worker incurs expenses on the job, and those expenses are repaid in an equivalent amount, such payments are not considered part of the wage.” *Newlander*, 58 Van Natta at 2706; *accord VanDolah*, 49 Van Natta at 594.

Here, the record does not support a conclusion that the subsistence and travel pay “repaid an equivalent amount already expended” by claimant. See *Newlander*, 58 Van Natta at 2706. Rather, claimant was paid a flat-rate of pay for his services

² Because claimant was injured in February 2009, WCD Admin. Order 08-065 (eff. January 1, 2009) applies.

regardless of any expenditures. He did not incur expenses and then seek and receive repayment “in an equivalent amount.” *See id.* To the contrary, he was paid what he “was contractually entitled to receive as a result of a valid, operative, and binding agreement,” irrespective of any expenses actually incurred. *See Anderson*, 207 Or App at 496; *Newlander*, 58 Van Natta at 2706. Those payments, therefore, qualify as wages. *Id.*

We agree with the ALJ’s assessment that the facts here are analogous to those in *McKee*, where we found that a flat-rate “per diem” pay constituted wages and should be included in the calculation of the claimant’s TTD rate. *See* 47 Van Natta at 2029-30. We reached that conclusion in *McKee* because “no restrictions were placed on the use of” the “per diem” payment for “personal expenses.” *Id.* at 2030. Moreover, the claimant in *McKee* “was not required to submit receipts or establish that the money was spent on only work-related or travel expenses.” *Id.* Consequently, we concluded that the “per diem” payment was not “merely a reimbursement for work-related or travel expenses.” *Id.*

The factors cited in *McKee* support our conclusion. Here, “no restrictions were placed on the use of” the subsistence and travel pay and claimant “was not required to submit receipts or establish that the money was spent” for any limited purpose. *See id.* To the contrary, claimant was entitled to the pay regardless of any expenditures made and was free to keep any or all of that pay. Therefore, like *McKee*, we do not find that the disputed payments here were “reimbursements,” but rather “wages” that should be included in the calculation of claimant’s TTD rate. Consequently, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ’s order dated January 26, 2011 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$4,000, to be paid by SAIF.

Entered at Salem, Oregon on May 27, 2011