STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
	)	
GERARD LAVALLEE	)	
	)	
VS.	)	W.C.C. 99-04588
	)	
TRANSPORT DRIVERS	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. This matter came on to be heard before the Appellate Division upon the respondent/employer's appeal from the decision and decree of the court entered on April 25, 2002. Judge Andrew McConnell heard this matter as an Employee's Original Petition alleging low back, neck and left leg injuries on July 6, 1999 with a prayer for compensation benefits from July 7, 1999 and continuing. A pretrial order dated November 11, 1999, was entered in connection with this matter finding that the employee sustained a lumbar strain and was partially incapacitated for employment. The case proceeded to trial on a single issue. At trial the parties submitted a stipulation of facts, which was marked as joint exhibit. This stipulation stated:

> "1. That the employee sustained an injury in the nature of a lumbar strain arising out of and in the course of his employment on July 6, 1999.

2. That the employee was partially incapacitated from July 7, 1999 and continuing as a result of the above-referenced injury.

3. That the employee has received benefits under both a nonprejudicial agreement and the pretrial order entered in this matter on November 24,1999 based on an average weekly wage of $674.55.

4. That the only issue in dispute is whether the employee's average weekly wage should include the 'per diem' entry documented in Employee's Exhibit # 1. The employer submits that such entry should be excluded in which case the employee's average weekly wage would be $674.55. The employee submits that such entry should be included in which case the employee's average weekly wage would be $875.40."

Thus, the sole issue to be determined at trial was the employee's average weekly wage at the time of his injury. The basic wage calculation was not disputed and the only bone of contention dealt with the inclusion of a "per diem" payment made to the employee. A review of the stipulation demonstrates the difference in the wage calculation if the payment is factored in. If the "per diem" entry were to be excluded, the employee's average weekly wage would be Six Hundred Seventy-Four Dollars and 55/100 ($674.55). If the "per diem" entry were to be included, the employee's average weekly wage would be Eight Hundred Fifty-Seven Dollars and 40/100 ($857.40).

The trial judge eventually found that the "per diem" entry found in the Employee's Exhibit #1 was to be included in calculating the employee's average weekly wage (A.W.W.). The accompanying decree to the trial judge's April 25, 2002 contained the following finding:

> "1. That the employee's average weekly, wage, including the so-called "per diem" was Eight Hundred Fifty-Seven Dollars and 40/100 ($857.40)."

From that decision and decree, the present appeal ensued.

The employer, Transport Drivers, Inc., filed the following as its sole reason of appeal from the decision and decree by the trial judge on April 25, 2002:

> "The decision and decree is against the law and the evidence and the weight thereof since the trial court awarded the employee continuing weekly partial incapacity benefits based on an average weekly wage of $857.40 which included a $.039 per mile per diem or subsistence payment that the employee received to cover expenses while he was on the road as a truck driver. The trial court's findings in this regard are clearly erroneous and are not supported by the competent evidence in the record. In particular, the employer submits that the calculation of the employee's average weekly wage is erroneous as a matter of law to the extent that it includes the per diem or subsistence payment of $.039 per mile which was meant to cover the employee's special expenses due to the matter of his employment. The inclusion of those amounts is contrary to the express language of R.I. Gen. Laws § 28-33-20 which excludes such amounts from the calculation of the employee's average weekly wage."

The trial judge based his decision on the Appellate Division decision Conrad Fontaine v. Commercial Insulation, W.C.C. No. 90-06681 (1992),

which seems to be squarely on point with the facts of the present case. In Fontaine, the Appellate Division dealt with the question of how to calculate an employee's average weekly wage and whether an additional payment made to the employee for mileage should be included in determining the average weekly wage. The Appellate Division there held:

> "where a mileage reimbursement is made to the employee based upon the actual travel expenses incurred, the reimbursement does not affect the employee's actual earnings and would not be included in the average weekly wage calculation."

When payments made to an employee are not based upon the "actual miles expended by the employee traveling, such payments shall be included in the calculation of the employee's average weekly wage." According to the holding in Fontaine, unless a mileage payment to an employee represents the "actual expenses incurred by the employee ....the only conclusion which may be drawn is that the mileage payment is in the nature of income which should be included in the average weekly wage."

The panel in Fontaine gave added emphasis to the term "incurred" when interpreting the language of R.I.G.L. § 28-33-20 in formulating its decision. The pertinent language of R.I.G.L. § 28-33-20 cited reads:

> (iii) "Where the employer is accustomed to paying the employee a sum to cover any special expense incurred by the employee by the nature of the employment, the sum paid is not reckoned as part of the employee's wages, earnings, or salary. (emphasis added)."

As the trial judge correctly pointed out, the Fontaine Court "was confronted with that same language [Section 28-33-20] and it reasoned that there is a distinction between a situation where a worker applies for reimbursement of a certain amount of expenses, and a situation such as this where an employee is paid so much per mile while performing his job, whether in fact he actually incurred any expenses." (Tr. Dec. p. 3). The trial judge further stated, "I realize the employee testified that the amount of per diem is not included in his yearly W2 statement, and that he has never paid tax upon that payment, but I don't think that changes the fact that this is an added consideration paid to a worker for each mile he performed regardless of whether he has to pay anything for personal needs." (Tr. Dec. p. 4).

In the instant petition, the employee testified that under the existing wage rates, his pay was calculated at .139 Dollars per mile of travel. This is referred to as the "base rate" in the employee's handbook. (Ee. Exh. 2). In addition, the employee would be paid .039 Dollars per mile as a per diem. (Pet. Exh. 2). The employee testified that he is not taxed on this added amount and that it constitutes an allowance for while he is traveling on the road.

On cross examination, the employee testified, "I get paid by the mile, not hourly." If the employee is not in the process of driving while at work, but rather waiting for the loading or unloading of his truck, he is paid at the flat rate of Eight Dollars and 25/100 ($8.25) per hour. The employee further

testified upon cross examination that it was his understanding that the per diem was to cover "meals, showers and any incidentals while I am away from home." He testified that the per diem amount would cover his expenses some weeks and not cover expenses in other weeks. The employee testified upon cross examination that he is not required to submit a reimbursement form to the employer for his meals.

> "Q. You don't submit a reimbursement form to your employer for your meals?
>
> A. No.
>
> Q. And that happens whether or not your meals exceed the point 039 times your mileage or not, is that correct?
>
> A. Correct.
>
> Q. Okay. So on some weeks you may actually get more in subsistence than you spend on incidentals, correct?
>
> A. It is possible.
>
> Q. And some weeks you get less?
>
> A. Some weeks I get less." (Tr. p. 25)

It is fair to say that the thirty nine one thousands of a Dollar ($0.039) payment is not contingent upon the submission of receipts accounting for the actual cost of the employee's expenses but rather to provide additional compensation for the actual miles traversed. As such, we feel that this payment reflects additional compensation for the services actually performed. Based upon that interpretation, the payment must be considered in

evaluating his earnings capacity. In Bailey v. Am. Stores Inc./Star Market, 610 A.2d 117 (R.I. 1992), the court discussed the basic intent behind the various wage calculation formulae set forth in R.I.G.L. §28-33-20. The justices there noted:

> "When we place §28-33-20 in its full context, we believe the General Assembly made the legislative overture to link the average weekly wage to an employee's earning capacity."

The court there held that this provision should be construed to arrive at an average weekly wage that will reasonably represent the employee's weekly earning capacity at the time after injury. In the present case, the inclusion of the per diem adjustment must be construed as wages since we believe it does represent compensation for services rendered. As such, the trial judge was not clearly erroneous for including such payments in computing the employee's average weekly wage in accordance with the Fontaine holding.

For the aforesaid reasons, the employer's reasons of appeal are hereby denied and dismissed and we, therefore, affirm the trial judge's decision and decree.

The employer shall pay a counsel fee in the amount of Seven Hundred Fifty Dollars and 00/100 ($750.00) to Ronald Creamer, Esq. for services rendered before the Appellate Division.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, a copy of which is enclosed, shall be entered on

Rotondi and Bertness, J. J. concur.

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the respondent/employer and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on April 25, 2002 be, and they hereby are affirmed.

The employer shall pay a counsel fee in the amount of Seven Hundred Fifty Dollars and 00/100 ($750.00) to Ronald Creamer, Esq. for services rendered before the Appellate Division.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Ronald Creamer, Esq. and Susan Pepin-Fay, Esq. on

_____