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IN THE SUPREME COURT

OF THE STATE OF UTAH

BLAKE STEVENS CONSTRUCTION
and HARTFORD INSURANCE,

Plaintiffs,

vs.

Case No. 19006

DWINN A. HENION, Mother of
BARI LYN BLAIR, daughter of
BARRY A. BLAIR, deceased, and
THE INDUSTRIAL COMMISSION OF
UTAH,

Defendants.

PLAINTIFF'S BRIEF

PETITION FOR REVIEW FROM THE
INDUSTRIAL COMMISSION

HONORABLE TIMOTHY C. ALLEN, ADMINISTRATIVE LAW JUDGE

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Defendants.

PLAINTIFF'S BRIEF

PETITION FOR REVIEW FROM THE
INDUSTRIAL COMMISSION

HONORABLE TIMOTHY C. ALLEN, ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE NATURE OF THE CASE

This Petition is for the review of the Industrial Commission's decision that "average weekly wages" under the Workmen's Compensation Act includes an out-of-town subsistence allowance paid to an employee to cover expenses he would not have incurred but for his employment activities.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Application for dependent death benefits under the Workmen's Compensation Act was heard by Administrative Law Judge Timothy C. Allen. Judge Allen awarded dependent death benefits based upon an average weekly wage of $5.50 per hour for a 35 hour work week and a $32.50 daily out-of-town subsistence allowance. Plaintiffs filed a Motion to review the inclusion of the subsistence allowance in the average weekly wage. The Industrial Commission denied the Motion.

RELIEF SOUGHT ON APPEAL

Plaintiff's seek a ruling that the "average weekly wage" under the Workmen's Compensation Act does not include an out-of-town subsistence allowance paid to an employee to cover expenses he would not have incurred but for his employment activities. Plaintiffs request that this Court reverse the Industrial Commission's inclusion of this subsistence allowance in the decedent's average weekly wage.

STATEMENT OF FACTS

Defendant Dwinn Henion and decedent Barry A. Blair began living together in July, 1981. One month later they learned that she was pregnant. In September, 1981, they became engaged and set their wedding date for March, 1982, two months before their child was expected. This wedding date was later

postponed until after the child's birth so that Ms. Henion could remain single and receive free maternal care. During this time they continued to reside in Salt Lake County. (R. 30, 31, 35, 36, 63, 65).

While they were living together, decedent was employed by Blake Stevens Construction. Until November, 1981, he worked in the Salt Lake Valley Area. In November, 1981, decedent began working on a job in Green River, Wyoming. Since this work was out-of-town, decedent regularly travelled to Green River on Monday and returned home on Friday night. While working in Green River decedent received a $32.50 per day subsistence allowance in addition to his wage of $5.50 per hour for a 35 hour work week. On January 14, 1982, decedent was electrocuted while working in Green River. In June, 1982, decedent's posthumous child was born. (R. 29, 47, 65, 66).

The Industrial Commission awarded death benefits to decedent's posthumous child based upon an average weekly wage of $355 per week. This represents $192.50 in hourly wages and $162.50 in subsistence allowance. The plaintiffs challenge

the inclusion of the subsistence allowance in the average weekly wage.[1]

ARGUMENT

The Workmen's Compensation Act provides that those who are wholly dependent upon a person who dies as a result of an industrial accident shall receive weekly death benefits of 66-2/3% of the decedent's "average weekly wage" at the time of injury, but no more than 85% of the state average weekly wage at the time of injury. Utah Code Ann. § 35-1-68(2)(b)(i) (1953). The formula for computing the average weekly wage where wages are fixed by the hour is described in Utah Code Ann. § 35-1-75(1)(e) (1953):

> (1) Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the weekly compensation rate and shall be determined as follows:
>
> (e) If at the time of the injury the wages are fixed by the hour, the average weekly wage shall be determined by multiplying the hourly rate by the number of hours the employee would have worked for the week if the accident had not intervened. In no case shall the hourly wage be multiplied by less than 20 for the purpose of determining the weekly wage.

---

[1]The inclusion of the subsistence allowance in computing the average weekly wage provides an additional $28,080 in benefits over the first six years. (The $355 average weekly wage qualifies for maximum weekly payments of $218, while a $192.50 average weekly wage qualifies for weekly payments of $128.) If benefits are extended under Utah Code Ann. § 35-1-70 (1953) for more than twelve years, the difference will exceed $84,000.

POINT I

A SUBSISTENCE ALLOWANCE PAID TO AN EMPLOYEE TO COVER EXPENSES HE WOULD NOT HAVE INCURRED BUT FOR EMPLOYMENT ACTIVITIES ARE NOT A PART OF HIS AVERAGE WEEKLY WAGES UNDER THE WORKMEN'S COMPENSATION ACT.

Since dependent death benefits under the Workmen's Compensation Act arise by legislative enactment, whether a subsistence allowance is included in the "average weekly wage" presents a question of statutory construction. In resolving this question, the legislative definition of "average weekly wage" must control. As set out in Utah Code Ann. § 35-1-75, where the wages are fixed by the hour, the average weekly wage "shall be determined" by multiplying the hourly rate by the number of hours that would have been worked during the week of the accident. The decedent's wages at the time of the accident were fixed by the hour. As a matter of law, the Industrial Commission should have determined that the decedent's average weekly wage was $192.50, the hourly rate of $5.50 per hour multiplied against the 35 hour work week. Since the statutory formula does not include a subsistence allowance for out-of-town work, its inclusion in the average weekly wage by the Industrial Commssion was error.

This conclusion is not only mandated by the statutory formula established by the legislature, but is also compelled by the formula's legislative history, the meaning of wages

and subsistence allowances, and the policy of the Workmens' Compensation Act.

A. The Legislative History of § 35-1-75 Demonstrates A Rejection Of The Industrial Commission's Definition.

The present § 35-1-75 was enacted in 1971. 1971 Utah Laws ch. 76, § 10. It was modeled after § 19 of the "Workmen's Compensation and Rehabilitation Law" proposed by The Council of State Governments through its Committee on Suggested State Legislation. See "Workmen's Compensation and Rehabilitation Law (Revised)" published in July, 1974 by the Council of State Governments. As noted by Professor Larson, this section is somewhat different from the common wage-basis statute and is an attempt to anticipate controversies under the common statutes. 2 A. Larson, The Law of Workmen's Compensation (1981). § 60.11(a), footnote 77.

One of the controversies anticipated by the Council was whether the reasonable value of board, room, rent, housing, lodging, fuel and similar advantages would be a part of average weekly wages. The Council proposed that "wages" means:

> [I]n addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer. § 2(n), Workmens Compensation and Rehabilitation Law.

In enacting § 35-1-75, the Utah Legislature did not choose to adopt the Council's recommended definition. In-

stead, our legislature made the hourly rate, in this case, the controlling factor. The Industrial Commission's redefining of "average weekly wages" to include what the legislature rejected is improper.

B. The Meaning Of Wages Is Entirely Different From That Of A Subsistence Allowance.

As commonly understood, wages are "money paid or received for work or services, as by the hour, day or week." The Random House Dictionary of The English Language (1967). In Utah Code Ann. § 34-28-2(2), the legislature adopted a similar definition in establishing the law governing the payment of wages by employers:

> The word "wages" means all amounts due the employee for labor or services, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount.

The same definition was used by the legislature in establishing wages as a preferred debt. Utah Code Ann. § 34-26-4. In all instances, the underlying nature of wages is monetary remuneration for labor or services.

In contrast, a subsistence allowance is money paid in addition to wages "to cover expenses [an employee] may incur in performing his job." The Random House Dictionary of The English Language (1967). Although both wages and subsistence allowances are an employer's cost of doing business, the similarity ends there. A subsistence allownace is not re-

muneration for labor or services but rather payment to cover employee expenses incurred because of the work. So long as the employee works, he receives wages. However, he only receives a subsistence allowance so long as he incurs special expenses because of the work.

In this case the decedent was earning wages of $5.50 per hour. At his employer's direction, he began working in Green River, Wyoming for a time. Since commuting from his home in Salt Lake to Green River was impracticable, he would leave for Green River on Monday and return home on Friday night. Because his work in Green River required him to incur lodging, meal and travel expenses he would not have otherwise incurred, he was paid a $32.50 daily subsistence allowance to cover, at least in part, these expenses. To say that this subsistence allowance represented remuneration for labor subverts the meaning of wages.

C. The Policy Of The Workmen's Compensation Act Prohibits Including A Subsistence Allowance In Average Weekly Wages.

The underlying policy of the Workmen's Compensation Act is to assure an employee and his dependents certain compensation, medical and disability benefits for industrial accidents without undue expense, delay or uncertainty. State Tax Commission v. Department of Finance, 576 P.2d 1297 (Utah 1982). When an employee dies in an industrial accident, the

legislature has determined that his family should receive a percentage of what the employee would have been expected to receive in wages had he not died, all according to a strict formula. It was never intended that these benefits represent anything more.

When the Industrial Commission included the subsistence allowance in its award, the decedent's dependent benefited by $28,080 over six years. Had he not died, the decedent would not have had this amount available for the care of his dependent. Even assuming that his out-of-town work would have continued that long, he would have been required to spend the subsistence allowance on expenses incurred because of his employment. Thus, including the subsistence allowance in the average weekly wage is nothing more than a windfall.

The windfall nature of including the subsistence allowance in average weekly wages is illustrated by a hypothetical. Suppose that the decedent was still being paid $5.50 per hour and given a $32.50 daily subsistence allowance for out-of-town work. Working with him was a co-employee who was also paid $5.50 per hour. However, since this co-employee lived near the worksite, he was not paid a subsistence allowance. If both died in the same industrial accident, the co-employee's dependents would receive $28,080 less in benefits, although the work and wages of both would have been the

same. Yet because the decedent was incurring employment related expenses for which he was being reimbursed and which would no longer be incurred, his dependent would receive a substantially greater benefit.

Such a result was not the intent of the legislature. According to legislative policy, the hourly wage without the subsistence allowance represents what the decedent would have been expected to receive had he not died.

POINT II

THE INDUSTRIAL COMMISSION'S RATIONALE FOR ALLOWING DEATH BENEFITS BASED ON A SUBSISTENCE ALLOWANCE IGNORES STATUTORY MANDATE, MISCONSTRUES THE CONCEPT OF ROOM AND BOARD AND MISAPPLIES THE CONCEPT OF REAL ECONOMIC GAIN.

In denying the Motion for Review on the issue of the subsistence allowance, the Industrial Commission offered this rationale:

> With regard to the inclusion of the daily subsistence allowance as a part of the decedent's wage, we are of the opinion that the Administrative Law Judge made the correct decision. Professor Larsen [sic] in his treatise The Law of Workmen's Compensation, Section 60-12(a), cites with approval the inclusion of room and board as a portion of wages on the basis that it constitutes a real economic gain to the employee. This has long been the policy of the Commission and we see no reason to change it now.

Plaintiffs submit that this rationale is deficient for three reasons. First, it ignores the formula mandated by

statute. Second, it misconstrues the concept of room and board. And third, it misapplies the concept of real economic gain. Before addressing each of these points, it should be observed that whether "this has long been the policy of the Commission" is irrelevant. The statute, not the Commission's policy, governs. Like the Commission's long standing policy of regulating hospital fees which was struck down by this Court in Intermountain Health Care v. Industrial Commission, 657 P.2d 1289 (Utah 1982), this policy must be struck down as contrary to law regardless of Commission policy.

A. In Awarding Death Benefits Based Upon A Subsistence Allowance, The Industrial Commission Ignored The Formula Mandated By The Legislature.

Since workmen's compensation benefits arise by legislative decree, they are only so broad as the legislative mandate provides. Thus the proper place to begin an inquiry as to the scope of benefits is the language of the statute. As previously discussed, under § 35-1-75, wages do not include a subsistence allowance for out-of-town employment. Regardless what reasons the Industrial Commission may have for wanting to change this law, they are duty bound to follow, not ignore it.

Not only has the Industrial Commission failed to consider the statutory mandate, but it has also failed to recognize that in those states where room and board has been allowed to

the extent of real economic gain, the governing statutes differ from our statute.

In Leatherbury v. Early, 32 N.E.2d 99 (Ind. Ct. App. 1941), the Industrial Board awarded compensation based upon earnings which included room and board at the saw mill where the employee worked. In affirming this award the Court observed that the governing statute defined "average weekly wages" as "earnings of the injured employee in the employment in which he was working at the time of the injury." 32 N.E.2d at 100. The Court went on to note that the statute also contained the following provision for allowances:

> Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings. 32 N.E.2d at 100.

Since the statute specifically included allowances in lieu of wages and that was the nature of the employee's room and board, the Court concluded that its inclusion in earnings was statutorily mandated.

In Leslie v. Reynolds, 179 Kan. 422, 295 P.2d 1076 (1956), the injured employee was a farm worker who received in lieu of wages a home on the farm, utilities paid, an automobile, and foodstuffs grown on the farm for use by the family. The Commissioner included the money value of these allowances in computing compensation. The governing statute provided:

> Whenever in this act the term 'wages' is used it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and shall not include gratuities received from the employer or others. Board and lodging when furnished by the employer as part of the wages shall be included and valued at $5 per week unless the money value of such advantages shall have been otherwise fixed by the parties at the time of hiring. 295 P.2d at 1081.

Based upon this statute the Court determined that the inclusion of room and board was proper to the extent of real economic benefit.

As these two cases illustrate, the proper inquiry is not what other jurisdictions do under different statutes but what § 35-1-75 requires. To do otherwise is to ignore the legislative mandate.

B. Treating The Out-Of-State Subsistence Allowance As Room And Board Misconstrues The Concept Of Room And Board.

In denying the Motion for Review, The Industrial Commission apparently relied on the following statement of Professor Larson:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips and bonuses, and room and board, constituting real economic gain to the employee. 2 A. Larson, The Law of Workmen's Compensation, § 60.12(a).

It should be observed that Professor Larson is not discussing the definition of "average weekly wages" but "actual earn-

ings." The distinction is critical since Professor Larson's treatment of this question is based upon the commonest type of workmen's compensation statute which employs the concept of "earnings" not "average weekly wages." Professor Larson has properly observed that this type of statute differs from that employed by Utah. 2 A. Larson, The Law of Workmen's Compensation, § 60.11(2). In addition, Professor Larson's own statement distinguishes wages from room and board, the former not including the latter in its definition. Thus Professor Larson's statement was not intended to cover the Utah statute and observes that room and board is not commonly understood to be wages.

Even assuming that it were an appropriate interpretation of the Utah statute, it has been misconstrued by the Industrial Commission. In addressing the issue of whether an out-of-town subsistence allowance is wages, the Industrial Commission uncritically equated an out-of-town subsistence allowance with room and board. Such a conclusion is unwarranted.

In footnote 6 to the above-quoted statement, Professor Larson cites various cases for the proposition that room and board represents actual earnings. A review of those cases demonstrates that Professor Larson is referring to the provision of room and board in lieu of wages, much like the

definition statute in Leatherbury, supra. For example, in [illegible] v. Industrial Commission, 151 Colo. 538, 379 P.2d 384 (1963), the value of living quarters provided to a motel manager was given in lieu of wages. In Bruno v. 414 W. 23d St. Corp., 12 A.D. 831, 209 N.Y.S.2d 620 (1961), a building superintendent's rent free apartment was given in lieu of wages and therefore a part of the compensation award. And in Hall v. Joiner, 324 So.2d 884 (La. App. 1975), an apartment manager received a rent free apartment in lieu of wages which was properly categorized as earnings.

Unlike the cases cited by Professor Larson, the decedent here received his regular wage while working in Green River. The out-of-town subsistence allowance was not given to cover expenses unrelated to employment but rather expenses that would not have been incurred but for the out-of-town employment. They were not given in lieu of wages. To say that they were misconstrues the statement of Professor Larson.

C. Including the Out-of-Town Subsistence Allowance as Average Weekly Wages Misapplies the Concept of Real Economic Gain.

Again considering the statement of Professor Larson upon which the Industrial Commission apparently relied and assuming that an out-of-town subsistence allowance can be equated to room and board, it still cannot be included in average weekly weages since it fails to "constitute real

economic gain to the employee." This point is illustrated by reviewing several representative cases where it was held that a subsistence allowance was not real economic gain to an employee.

In Layne Atlantic Company v. Scott, 415 So.2d 837 (Fla. Dist. Ct. App. 1982), the employee received allowances for out-of-town expenses. The statutory definition of wages included "the reasonable value of board, rent, housing, lodging or similar advantage received from the employer." The Court held that such advantages could only be included to the extent of real economic gain. The Court went on to observe that the out-of-town expenses ended with employment and concluded:

> In short, we cannot construe the term "wages" to include a make-whole reimbursement for uniquely work-related expenses that are created by and within the employment. 415 So.2d at 839.

On this basis the Court reversed the deputy commissioner and remanded for a redetermination of wages without the out-of-town expense allowance.

In Moorehead v. Industrial Commission, 17 Ariz. App. 96, 495 P.2d 866 (1972), the employee received a travel allowance for out-of-town work. The Industrial Commission refused to include this allowance in the compensation award which action was affirmed. In finding no real economic gain to the employee the Court stated:

> "[W]ages" do not include amounts paid to the employe to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment. Such payments are simply not intended as compensation for services rendered. 495 P.2d at 869.

And in Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N.W.2d 212 (1949), the employee was required to work out-of-town, leaving on Monday and returning home on Saturday. In addition to his salary, he received a subsistence allowance which the lower court had included in his compensation benefits. Although the governing statute specifically included room and board in its definition of wages, the Court reversed on the ground that the allowance was intended to cover employment incurred expenses not to compensate the employee. Thus, the Court concluded there was no real economic gain to the employee.

As illustrated by these cases, even where a statute defines wages as including allowances, a subsistence allowance is not included since it is not a real economic gain to the employee. To include it in the award of compensation here without such a statute not only goes beyond the statute, but also misapplies the concept of real economic gain.

CONCLUSION

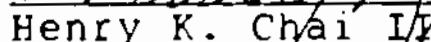
The award of the subsistence allowance as a part of the dependent death benefits by the Industrial Commission should be reversed for the following reasons:

1. Its inclusion is contrary to the statutory definition of average weekly wages as demonstrated by the statute's language, history, concept and policy.

2. It does not represent wages or real economic gain to the employee.

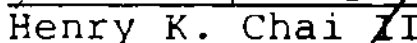
DATED this 21st day of April, 1983.

SNOW, CHRISTENSEN & MARTINEAU

By 
Henry K. Chai II

CERTIFICATE OF SERVICE

I certify that I have served two copies of this Brief on Timothy C. Houpt of Houpt & Eckersley, Suite 510 Judge Building, 8 East Broadway, Salt Lake City, Utah and two copies of this Brief on The Industrial Commission, P. O. Box 5800, Salt Lake City, Utah by placing the same in pre-addressed envelopes and depositing them in the United States Mail, first class postage prepaid.



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