1983

Blake Stevens Construction and Hartford Insurance v. Dwinn A. Henion, Mother of Bari Lyn Blair, Daughter of Barry A. Blair, Deceased, and the Industrial Commission Of Utah : Plaintiff's Reply Brief

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 REPLY BRIEF

PETITION FOR REVIEW FROM THE
INDUSTRIAL COMMISSION

HONORABLE TIMOTHY C. ALLEN, ADMINISTRATIVE LAW JUDGE

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ARGUMENT

Plaintiffs maintain that the average weekly wage is the hourly rate multiplied by the hours which would have been worked for the week had there been no accident. Utah Code Ann. § 35-1-75(1)(c). Defendants argue that Utah Code Ann. § 35-1-75(3) justifies the inclusion of an out-of-town subsistence allowance. § 35-1-75(3) states:

> If none of the methods in subsection (1) will fairly determine the average weekly wage in a particular case, the commission shall use such other method as will, based upon facts presented, fairly determine the employee's average weekly wage.

POINT I

DEFENDANT'S ARGUMENT WAS NOT RAISED BELOW NOR IS IT SUPPORTED BY THE FINDINGS OF THE INDUSTRIAL COMMISSION.

The initial problem with defendant's argument is that neither the defendant nor the Industrial Commission relied on § 35-1-75(3) in the proceedings before the Industrial Commission. Defendants presented no evidence to show that the statutory formula did not reflect the decedent's wages, as was their burden. Further, the Industrial Commission made no finding that the statutory formula unfairly reflected the decedent's wages. Having failed to rely upon or comply with § 35-1-75(3) before the Industrial Commission, defendant's argument should be rejected.

POINT II

BEFORE § 35-1-75(3) CAN BE APPLIED, THE OUT-OF-TOWN SUBSISTENCE ALLOWANCE MUST QUALIFY AS "WAGES".

Defendants suggest that under § 35-1-75(3) the Industrial Commission has discretion to determine what is "fair" in light of "a child who will never see her father." Brief of Defendants, pp. 5, 14. Though this is certainly a hardship for the child, it is not a factor in determining the decedent's wages. Nor is the proper test a question of what the Industrial Commission determines is fair. As noted in Craig

Farnham Produce v. Industrial Commission, 657 P.2d 1354 (Utah 1983), the test where the statutory formula does not properly reflect wages is what method "fairly determine[s] the injured employee's weekly wage." Even assuming that § 35-1-75(3) can now be argued, its application must rest upon a determination that an out-of-town subsistence allowance is wages.

POINT III

THE DETERMINATION WHETHER AN OUT-OF-TOWN SUBSISTENCE ALLOWANCE IS WAGES REQUIRES A REVIEW OF THE COMMON DEFINITION OF WAGES.

Defendants argue that it is minimally useful to look at the common definition of "wages" since § 35-1-75 specifically defines "wages" by formula. Brief of Defendants, p. 8. If this is true, there is no need to look past the statutory formula which defendants now challenge as unfair. And if it is not true, against what standard can defendants claim unfairness if not the common definition of wages. Defendant's recent reliance on a fairness argument belies their claim that the common definition of "wages" is irrelevant.

Furthermore, an examination of Section 75 mandates a resort to the common definition of wages. Subsections (1) and (2) define "average weekly wages" through various formulas. Under § 35-1-75(3), this average weekly wage stands unless it "will not fairly determine the average

weekly wage." § 35-1-75(3). This definition is circular and non-sensical unless the common definition of wages is applied under § 35-1-75(3). Defendants must accept the wage formula or resort to the common definition of "wages".

POINT IV

A SUBSISTENCE ALLOWANCE IS NOT "WAGES".

Defendants have not claimed that the common definition of "wages" offered by plaintiffs is incorrect. However, they suggest that an out-of-town subsistence allowances falls within that definition since the employer agreed to pay it and could be compelled to do so in a court of law. Brief of Defendants, p. 8. In so arguing defendants have not used the common definition of "wages" but rather have substituted it with an uncommon one, that whatever an employer agrees to give an employee is wages whether it is given for work performed or expenses incurred in the course of employment. Under defendant's approach, reimbursements or allowances by an employer for tools and uniforms would qualify as wages. As explained in plaintiff's Brief, although wages and subsistences allowances are an employer's cost of doing business, a subsistence allowance is not compensation for work but rather payment to cover expenses incurred because of the work. It ends when the expenses end. Wages continue to be paid so long as the work is performed.

This common distinction between wages and subsistence allowances is further illustrated by their income tax treatment. Under Internal Revenue Code § 61 (1954 as amended) both wages and subsistence allowances are "income". However, "expenses paid or incurred in connection with the performance of services by the taxpayer as an employee under a reimbursement or other expense allowance arrangement with his employer" are a deduction for arriving at the adjusted gross income. Internal Revenue Code § 62(c)(2) (1954 as amended). The net result is that a subsistence allowance used as intended is not earnings or wages.

This same distinction is even more clearly drawn in the treatment of the federal withholding tax on wages and the social security tax. Neither tax applies to an out-of-town subsistence allowance. In Central Illinois Public Service Company v. United States, 435 U.S. 21, 55 L.Ed.2d 82, 98 S.Ct. 917 (1978), the government claimed that a $1.40 allowance paid to employees for lunch while on authorized travel was wages. The Supreme Court rejected the government's position and found that under a broad definition of "wages" in the tax law, an allowance to cover employment related expenses was not a wage.

As commonly understood, a subsistence allowance for out-of-town work is not payment for labor and therefore, cannot be considered wages.

Defendants cite several cases to support their claim that an out-of-town subsistence allowance is wages. A review of these cases either shows the contrary or a rejection of the rule cited by Larson and espoused by the Industrial Commission.

In Matlock v. Industrial Commission, 70 Ariz. 25, 215 P.2d 612 (1950), a ranch hand received "$125 per month plus a house, utilities, milk, butter, eggs and meat whenever cattle were slaughtered, for [himself], his wife and three children." Without the issue being raised, the court treated these items as compensation for labor and included them in the wage computation. Unlike Matlock, the decedent did not receive his subsistence allowance except when he worked out-of-town. Nor was it meant to cover the woman with whom he was living or any children. It was not intended as compensation for labor but as an allowance for employment related expenses.

The inapplicability of Matlock is illustrated by Morehead v. Industrial Commission, 17 Ariz. App. 96, 495 P.2d 866 (1972), as discussed in plaintiff's Brief. There a travel allowance for out-of-town work was not considered wages. In

Dealing with Matlock, the court noted that the extra benefits to Matlock were intended to meet expenses "which would continue substantially unchanged whether Matlock was employed or not" while Moorehead's travel allowance was to cover "expenses which will cease with the cessation of [his] employment." 495 P.2d at 869. Since the travel allowance was not intended as compensation for services performed, it was not wages.

This same distinction applies to Morgan v. Equitable General Insurance Co., 383 So.2d 1067 (La. App. 1980) and Ardoin v. Southern Farm Bureau Casualty Insurance Co., 134 So.2d 323 (La. App. 1961). Morgan involved a domestic servant who was given some meals at work and taxi fare to work. The court found that these items were intended as compensation for services. Ardoin apparently involved a dairy hand who was given a home and milk. The court found that these items were intended as compensation for services. Neither Morgan or Ardoin presents an out-of-town subsistence allowance to cover employment related expenses.

Bannister v. Shepherd, 191 S.C. 165, 4 S.E. 2d 7 (1939), presents the opposite situation of Matlock. Rather than living on the ranch like Matlock, Bannister was a truck driver who lived on the road. He received $12.50 salary and $1.12 per week for board and lodging. The court included the

board and lodging as wages since it was intended as compensation for services. Again, this is not the situation presented here.

In Cosgriff v. Duluth Fireman's Relief Association, 233 Minn. 233, 46 N.W.2d 250 (1951), the applicant was a fireman and a member of the Duluth Fireman's Relief Association. On behalf of the Association, he attended a conference and was compensated at $10.00 per day plus railroad expenses. The compensation was also to cover his board and lodging. Based upon a specific statutory provision, the wages were found to be $10.00 per day. The railroad reimbursement was not included. Since there is no such statutory provision in Utah, the case is inapplicable.

The last two cases cited by defendants apparently represent a rejection of the rule enunciated by Larson. In American Surety Co. v. Underwood, 74 S.W. 2d 551 (Tex. Ct. App. 1934), the applicant was a traveling salesman who was reimbursed for meals and lodging away from home which the court found to be wages. In doing so the court rejected the reasonable economic gain rule discussed by Larson. In Rowe v. G. R. Kinney Co., Inc., 7 N.Y.S.2d 768 (Sup. Ct. 1938), a traveling salesman received a salary plus living expenses. Without discussion, the court found the living expenses to be earnings. It appears the court was following a rationale

similar to Matlock and Bannister or rejecting the real economic gain rule.

Defendants also make the argument that there is no real increase in expenses because of out-of-town work. Brief of Defendants, pp. 12, 13. Such a claim ignores common experience. Temporary lodging, extra travel and eating out on the road are all substantially greater than maintaining a household. Furthermore, decedent was required to do both.

Presumably to bolster this argument, defendants argue that there is no evidence to show that the decedent ever used his out-of-town subsistence allowance for out-of-town expenses. Defendants even suggest that he may have slept in a tent and brought his food with him. Such an argument ignores the burden which was on defendants to show that the out-of-town subsistence allowance was wages. Furthermore, if the defendants now rely on a real economic gain argument, it was their burden to prove that the allowance was that. Having failed to carry their burden, it must be assumed that the decedent used the allowance to cover his out-of-town employment related expenses as intended.

CONCLUSION

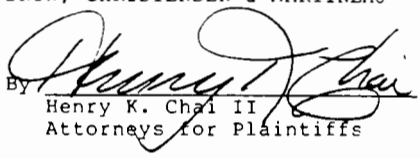
The death benefits must be paid on the basis of wages. Wages are not whatever is received from the employer but

rather compensation for services. Since the out-of-town subsistence allowance was intended to cover employment related expenses and not as compensation for services, its inclusion in the death benefits is improper. If a real economic gain test is applied, there is no proof by defendants of such a gain.

The out-of-town subsistence allowance should not be used in computed death benefits based upon wages.

DATED this 21st day of June, 1983.

SNOW, CHRISTENSEN & MARTINEAU

By 
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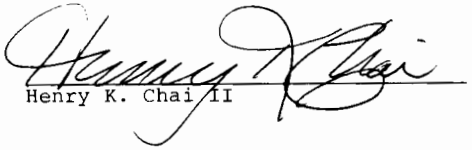
CERTIFICATE OF SERVICE

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 causing the same to be hand-delivered.



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