

BRB No. 06-0685

OTIS PEARLEY)
)
Claimant-Respondent)
)
v.)
)
B & D CONTRACTING) DATE ISSUED: 05/15/2007
)
and)
)
ZURICH AMERICAN INSURANCE)
COMPANY)
)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Pete Lewis (Lewis & Caplan), New Orleans, Louisiana, for claimant.

Richard S. Vale and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration (2005-LHC-1043) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a shipfitter on July 1999, earning \$16.50 per hour. Six months later, when filling out his tax return, claimant learned that his paycheck was divided between a taxable hourly rate of \$8.50 and an hourly *per diem* rate of \$8.00, on which he did not have to pay taxes. EX B. In July 2000, claimant was promoted and was paid \$9.50 per hour as wages and \$9.00 per hour *per diem*. EX C at 32.

Randall Smith, vice president of operations for D&B Management, which manages employer's operations, testified that claimant's pay was divided in this manner to give claimant more take-home pay and to benefit employer under IRS guidelines; according to Mr. Smith, claimant had no say as to the manner or method of payment. EX C at 19, 22, 25, 26-28. Mr. Smith deposed that the *per diem* was meant for travel and lodging and was provided to all employees regardless of where they lived or what their actual expenses were, and depended on the number of hours they worked. *Id.* at 29-30, 33, 34-36. Both the regular and the *per diem* pay appeared on the same paycheck. *Id.* at 35.

The parties stipulated that claimant injured his back in the course and scope of his employment on June 10, 2002. Claimant has not worked since his injury. Employer paid claimant temporary total disability benefits of \$241.52 per week from June 11, 2002, to January 26, 2006, for a total of \$45,761.82, plus medical benefits. The primary unresolved issue between the parties concerned the calculation of claimant's average weekly wage.

In his decision, the administrative law judge awarded claimant continuing temporary total disability benefits beginning on June 11, 2002, based on an average weekly wage of \$761.98, calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). He found that the portion of claimant's pay designated as a *per diem* should be included as "wages" for purposes of computing claimant's average weekly wage, because it was included in the money rate at which claimant was compensated for his work, pursuant to the Section 2(13) of the Act, 33 U.S.C. §902(13). Decision and Order at 5. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in including the *per diem* in his calculation of claimant's average weekly wage. Claimant responds, urging affirmance.

Section 2(13) of the Act defines "wages" as:

the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the

time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13). Employer contends that as the *per diem* payments were not subject to tax withholding, they are not “wages” pursuant to the holding of the Fifth Circuit in *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). Employer contends the administrative law judge erred in relying on *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), a case decided by the United States Court of Appeals for the Fourth Circuit, rather than on an opinion by the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which the instant case arises.

In *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT), the Fifth Circuit addressed the issue of whether the *value* of meals and lodging provided by employer pursuant to Section 119(a) of the Internal Revenue Code should be included in the claimant’s average weekly wage. The court held that it should not be included, as it was neither a monetary amount paid to the claimant nor a taxable non-monetary advantage. The Fifth Circuit concluded that Section 2(13) “provides that ‘wages’ equals monetary compensation plus taxable advantages.” *Id.*, 206 F.3d at 479, 34 BRBS at 27(CRT). Subsequently, the Fifth Circuit addressed whether container royalty payments should be included in the claimant’s average weekly wage calculation. In *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000), the court was guided by the Fourth Circuit’s decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), addressing the same issue. Relevant to the case presently before the Board, the *Wright* court defined “wages” in Section 2(13) as “the ‘money rate’ of compensation that is to be provided (1) for the employee’s services (2) by an employer (3) under the employment contract in force at the time of injury.” *Wright*, 155 F.3d at 319, 33 BRBS at 20(CRT). In *Gallagher*, the court stated,

In conclusion, the Fourth Circuit interpreted § 902(13) as defining “wages” as compensation paid by an employer for services rendered by an employee, the value of which may be readily converted into a cash equivalent. Finding the Fourth Circuit’s thoughtful analysis persuasive, we adopt their definitions of “wages” and “fringe benefits.” Accordingly, as a [container royalty payment] is paid in dollars and cents, and, thus, its value is apparent on its face, a [container royalty payment] is not a fringe benefit

under §902(13).

Gallagher, 219 F.3d at 432 , 34 BRBS at 39(CRT).

The administrative law judge rejected employer's assertion that *Quinones* is applicable in this case because *Quinones* dealt with the *value* of meals and lodgings, rather than with cash payments, as in the instant case. Decision and Order at 5. The administrative law judge found that *Quinones* thus addressed the second phrase of Section 2(13), under which tax withholding is a requirement. The administrative law judge found that when cash payments for services rendered are at issue, pursuant to the first phrase of Section 2(13), the entire "money rate" paid is includable in average weekly wage in accordance with *Quinones*, *Flanagan* and *Wright*. The administrative law judge found that claimant received cash payments of \$16.50 and \$18.50 per hour and the portion thereof designated as *per diem* bore no relation to any need for meals, transportation or lodging, as each employee received the same hourly rate, but was related solely to the number of hours worked.

We hold that the administrative law judge properly found that the *per diem* paid to claimant should be included in his average weekly wage as it was "monetary compensation" and not an untaxed "advantage." Pursuant to the holding in *Quinones*, "'wages' equals monetary compensation plus taxable advantages." The amounts labeled *per diem* here were part of the monetary hourly rate paid to claimant without regard to claimant's actual meals or lodging.¹ In *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *aff'g* 35 BRBS 65 (2001), *cert. denied*, 520 U.S. 1188 (2003), the claimant received a \$77.50 *per diem*, in addition to his salary. The *per diem*

¹ In *Quinones*, the court's specific holding was that the "value of §119 Meals and Lodging" is excluded from "wages" under Section 2(13). The court found that all parties agreed that the room and board provided qualified as meals or lodging under Section 119(a) of the Internal Revenue Code, which provides:

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if (1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

I.R.C. §119(a). Absent from the present case is any reference to Section 119 Meals and Lodging.

was not taxable and did not appear on the employees' W-2 forms. In affirming the inclusion of these payments in claimant's average weekly wage, the Fourth Circuit stated that the *per diem* payments had the indicia of regular wages in that case, as they correlated to the number of hours worked and not to any actual expenses incurred for room and board.² *Roberts*, 300 F.3d at 514, 36 BRBS at 54(CRT); *see also Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999) (affirming finding that the tips claimant received were wages under the first clause of Section 2(13), as they were part of the money rate at which claimant was compensated by employer).

As with the container royalty payments in *Gallagher*, claimant here was paid in dollars and cents, and as in *Roberts*, the *per diem* payments were part of the money rate claimant received from employer for his services and do not relate to reimbursement for expenses. Mr. Smith testified by deposition that the regular pay and *per diem* were in the same check, and that the *per diem* was paid without regard to the employees' actual expenses. EX C at 34-35. He stated that the pay was structured this way to give the employees greater take-home pay and to benefit employer. *Id.* at 28. Thus, the *per diem* is includable as part of claimant's average weekly wage under the first clause of Section 2(13), regardless of whether it is subject to tax withholding, as it is "monetary compensation." *Quinones*, 206 F.3d at 479, 34 BRBS at 27(CRT); *see Gallagher*, 219 F.3d at 432, 34 BRBS at 39(CRT). Therefore, as it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's inclusion of the amount designated as *per diem* in his calculation of claimant's average weekly wage.³ As there is no other challenge to the administrative law judge's award of benefits, it is affirmed.

² The court declined to address whether actual *per diem* payments would be included in average weekly wage. *Roberts*, 300 F.3d at 514, 36 BRBS at 54(CRT).

³ We reject employer's contention that *Berry v. Excel Group, Inc.*, 288 F.3d 252 (5th Cir. 2002), supports the conclusion that the *per diem* should not be included in claimant's average weekly wage. We agree with the administrative law judge that employer's reliance on that case is misplaced, as that case arose under the Fair Labor Standards Act. Moreover, we reject employer's reliance on decisions of other administrative law judges, as these decisions have no precedential value at the Board level.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge