Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 24, 2015

CLAIM NO. 201371674

PASCHALL TRUCK LINES INC PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

RONALD S. BOYD
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Paschall Truck Lines ("PTL") appeals from the February 19, 2015 Opinion, Award and Order and the March 23, 2015 Order denying its petition for reconsideration rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"). The sole question on appeal is whether the ALJ erred by including *per diem* payments in the calculation of

the average weekly wage ("AWW"). Finding no error, we affirm.

Ronald S. Boyd ("Boyd") testified by deposition on January 24, 2013 and December 4, 2014. He was employed by PTL as an over-the-road driver. Boyd was paid thirty-four cents per mile driven. He also received *per diem* payments which he believed were based upon his salary. He injured his hip when he fell from the cab of his truck. Because the issue on appeal concerns only the calculation of Boyd's AWW, we will not discuss the medical proof further.

Susan Williams, the workers' compensation and medical manager for PTL, testified by deposition on January 28, 2015. She did not perform the calculation of Boyd's AWW in the wage certification submitted in the claim. She opined that an AWW includes only taxable income and not expense reimbursement.

Charles Wilson, Chief Financial Officer of PTL, testified by deposition on January 28, 2015. He stated the *per diem* payments are an allowance for expenses that the IRS permits for transportation workers while working away from home. The *per diem* payment is based upon miles driven. The IRS allows payment of up to $59.00 per day without proof or documentation of those expenses. PTL does not consider the

per diem payment to be taxable income. PTL's policy is to calculate AWW using only taxable wages.

Lea Wells, PTL's director of safety and risk management, testified by deposition on January 19, 2015. She indicated expense reimbursement is paid for meals and incidentals incurred such as laundry, dry cleaning, tips and fees while a driver is away from home. The amount is based upon the miles driven during a week, and the driver is not required to file an expense report to substantiate his actual expenditures. To her knowledge, expense reimbursement is not taxable income. In the past, PTL had included *per diem* payments in the calculation of AWW, but Ms. Wells believed the policy changed following "some legal cases" that did not involve PTL.

PTL filed its Form 111 on September 25, 2014 with an attached wage certification indicating an AWW of $623.31. The calculation included *per diem* payments. On December 9, 2014, PTL filed a second wage certification excluding the *per diem* from the calculation and indicating an AWW of $429.39.

After noting the definition of wages set forth in KRS 342.0011(17) and KRS 342.140(6), reviewing the evidence, and noting the parties' positions, the ALJ agreed with the Board's holding in Mike Helm v. First Class Services, Claim

Number 2013-74332, issued February 13, 2015. The ALJ concluded the payments did not have to be reported for income tax purposes to be considered as "wages" and included in the calculation of the AWW. Accordingly, the ALJ found Boyd's AWW is $623.31.

PTL filed a petition for reconsideration making essentially the same arguments it raises on appeal. In his March 23, 2015 order, the ALJ, again citing the Board's decision in Helm, noted the terms "*per diem*" and "expense reimbursement" are distinguishable. The ALJ noted the Board determined a pure expense reimbursement is not included as wages for purposes of calculating AWW, but a *per diem* paid without regard to whether any expense is actually incurred is included in the AWW calculation. The ALJ noted Charles Wilson's testimony that Boyd was paid the *per diem* regardless of whether an expense was incurred and he did not have to present receipts to receive the payments. Accordingly, the ALJ denied PTL's petition for reconsideration.

On appeal, PTL argues the ALJ erred as a matter of law by including non-taxable expense reimbursement payments in the calculation of Boyd's AWW. PTL notes the payments are not wages, but rather reimbursement for actual expenses incurred while working away from home. PTL

contends the most important consideration is the fact the payments are not taxable income. It further emphasizes the payments are not paid for services rendered, are not a performance bonus, and no economic gain was received. PTL attempts to distinguish the present case from the holding in Helm, noting the payments to Boyd were not a stipend, pay allowance or set pay representing the same fee for each pay period. Rather, PTL contends the payments were issued for actual employment related expenses incurred while working away from home, determined by the miles driven. Unlike the situation in Helm, PTL argues Boyd's reimbursement did not include lodging because he lived in his truck while on the road. PTL urges the Board to apply the holding in Jackson v. Gentiva Health Services, 2013 WL 6795946 (Ky. App. 2013) rendered December 20, 2013. PTL contends the reimbursement should be treated like a fringe benefit and excluded from the AWW calculation.

KRS 342.140(6) defines wages as follows:

> The term "wages" as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

Likewise, KRS 342.0011(17) states:

> "Wages" means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel, or similar advantages received from the employer, and gratuities received in the course of employment from persons other than the employer as evidenced by the employee's federal and state tax returns;

Although PTL places great emphasis on the testimony of Lea Wells and Charles Wilson regarding whether the payments constitute wages or taxable income, the statutory definition is controlling. The payments at issue were properly included in the calculation of Boyd's AWW. We therefore affirm.

Our decision in Helm is directly on point. In Helm, we held payments need not be reported as taxable in order to be considered wages as defined in the Act. As noted by Professor Larson:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee.

Larson's Workers' Compensation Law (2012) §93.01[2][a].

In Helm, we further observed:

> Based upon our review, the key distinction is whether the payment at issue represents a true employment-related expense reimbursed by the employer upon actual occurrence of the expense or a *per diem* paid regardless of whether it is used for its intended purpose, or whether any expense is actually incurred. If the payments fall within the first category, it is not to be included as "wages" in the calculation of AWW. If the payments fall within the second category it is to be included in calculating the AWW.
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> . . . .
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> We decline to adopt First Class' argument the additional payments cannot be considered in calculating AWW unless it was reported as income for tax purposes, regardless of whether the Claimant received an economic gain. This hard line approach is in direct conflict with the Board's previous holding that KRS 342.140(6) does not require "wages" other than gratuities to be reported on a state or federal income tax return in order to be counted for purposes of computation of an employee's AWW. *See also* Larry Riley v. Louisville Metro Government, Claim Number 2010-90583, rendered February 15.

This Board has specifically addressed whether meal reimbursements can be included as wages in determining AWW in Comair, Inc v. Susan Aubert, Claim Number 2005-64443, rendered February 5, 2008, and Comair, Inc. v. Karen Davenport, Claim Number 2006-80757, rendered February 15, 2008. In Aubert and Davenport, the ALJ included in the calculation of AWW portions of *per diem* payments to the traveling claimants for meals deemed nontaxable by the

Internal Revenue Service. We affirmed, determining the express language of the statutory definitions does not mandate payments made to employees must represent a taxable event according to the IRS or be included as income in an employee's federal tax return in order to qualify as part of the employee's wage, with the exception of gratuities received from third parties. Aubert provided the following analysis regarding the *per diem* payments for meals:

> In the instant case, Mueller testified Aubert received per diem when traveling paid on an hourly basis to cover 'meals, Cokes,. . . a pack of gum,' etc. Moreover, the flight attendants' union contract with Comair confirms that Aubert's per diem payments constituted 'a meal allowance . . . for each trip hour or fraction thereof' that Aubert was traveling in Comair's employ. Since absent the per diem payments Aubert ordinarily would be expected to buy food as a personal expense whether on or off the job, the additional hourly sums paid by Comair pursuant to the union contract represent 'a real economic gain to the employee.' In addition, KRS 342.0011(17) and KRS 342.140(6) expressly mandate that 'the reasonable value of board . . . received from the employer' shall be included in the employee's AWW calculation. Merriam-Webster's Dictionary defines 'board' as mean 'to provide with regular meals and often lodging usually as compensation.' Accordingly, as a matter of law we find no error concerning the ALJ's inclusion of the entire amount of Comair's per diem payments in the calculation of Aubert's AWW. Given the plain language of KRS Chapter 342, the fact that a

> portion of those payments qualify as nontaxable under federal law is of no consequence, and merely serves to buttress the tangible measure of real economic gain realized by Aubert on account of the additional sums.

In Beverly Jackson v. Gentiva Health Services, Claim Number 2011-00911, rendered February 22, 2013, the ALJ excluded mileage reimbursement from the calculation of AWW. In addition to her regular pay, Ms. Jackson received mileage reimbursement at the rate of $2.50 per mile for her travels as a certified nurse's assistant only when she submitted to her employer 'visit slips' reflecting the patients she visited each day. We affirmed, stating,

> Mileage reimbursement is paid to reimburse an employee for employment-related expenses, and is not paid unless the mileage or travel is actually incurred. On the other hand, *per diem* is a set amount paid whether it is used for its intended purpose, or whether any expense is actually incurred.

Because the mileage reimbursement represented a true employment-related expense and it was not reported as taxable income, the Board found no error in excluding it from the AWW calculation. The Court of Appeals affirmed the Board in an unpublished decision. *See* Beverly Jackson v. Gentiva Health Services, 2013-CA-000549, rendered December 20, 2013.

In the case *sub judice*, the evidence does not vary significantly from the facts in Helm. The evidence establishes the *per diem* payments to Boyd were determined by the number of miles driven during a week. Thus, the payment is dependent on the amount of work performed, *i.e.* driving, rather than the actual expense incurred. That amount was paid to Boyd regardless of whether he incurred any expenses while on the road and he was not required to verify any amount incurred. The fact the amount of the payment has no relationship to the actual expenses Boyd may have incurred weighs heavily toward finding the payment to be a *per diem* payment rather than an expense reimbursement. The facts in the present claim are more in line with Helm than with Jackson. We find no error in the ALJ's inclusion of the *per diem* payments in the calculation of Boyd's AWW.

Accordingly, the February 19, 2015 Opinion, Award and Order and the March 23, 2015 order denying PTL's petition for reconsideration rendered by Hon. Douglas W. Gott, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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