BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GLEN NAYLOR,

Claimant,

vs.

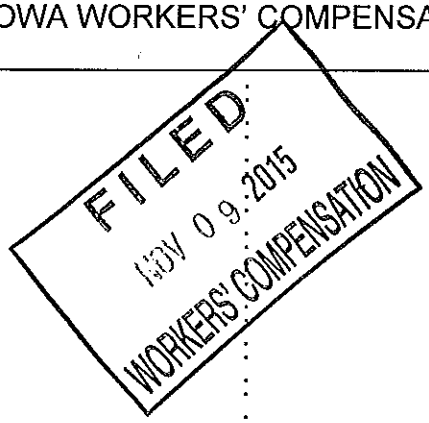
FAGEN, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5049149

ARBITRATION

DECISION

Head Note No.: 3001

STATEMENT OF THE CASE

Glen Naylor, the claimant, seeks workers' compensation benefits from defendants, Fagen, Inc., the alleged employer, and its insurer, Zurich American Insurance Co., as a result of an alleged injury on August 12, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on September 25, 2015, but the matter was not fully submitted until the receipt of both parties' briefs and argument on October 13, 2015. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On August 12, 2014, claimant received an injury arising out of and in the course of employment with Fagen, Inc.

2. The injury is a cause of temporary disability or healing period during a period of medical recovery from the injury and a cause of permanent disability. However, at hearing the parties explained that the issues of the extent of claimant's entitlement to these benefits are not ripe for adjudication because both parties agree claimant has not achieved maximum medical improvement and has not returned to work. Claimant is currently receiving temporary total/healing period benefits.

3. At the time of the alleged injury, claimant was married and entitled to three exemptions for income tax purposes.

4. Medical benefits are not in dispute.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Claimant's gross rate of weekly compensation for the purposes of determining the appropriate weekly rate of compensation pursuant to Iowa Code section 85.34.

II. The extent of claimant's entitlement to reimbursement for an independent medical evaluation of his disability pursuant to Iowa Code section 85.39.

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13 as a result of paying an inaccurate weekly rate of compensation.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Glen, and to Fagen, Inc. as Fagen.

Glen, age 38, is a boilermaker/rigger and has been working in that occupation for many years. He resides in Kirbyville, Texas. He injured his back and hip while working for Fagen on a project in Denison, Iowa. Glen states that he typically works at locations other than his home, and when he is working on a project, he typically works 70-84 hours a week.

The record is unclear as to what date he began working for Fagen. Glen only stated he began in August 2014. Apparently, he stopped working for Fagen at the time of his work injury on August 12, 2014. According to Glen, when he was hired by Fagen, he was to receive $34.25 per hour and time and a half for any hours over 40. He also was to receive $80.00 per day as a "per diem," and $.57/per mile for his travel from his home in Texas to Denison, Iowa and the same mileage rate from Denison to his home after the job was completed. Fagen was also to pay for his motel accommodations. According to Glen, the payment of the "per diem" is a common practice for employing boilermakers when the location of the job is a certain distance from home. He stated

that he never had to submit receipts to obtain a per diem payment from prior employer or from Fagen.

According to an affidavit by Mark Neu, the Corporate Safety Director for Fagen, Glen was hired for a job in Arthur, Iowa, and the per diem was paid to employees who were 60 or more miles from the job site and was intended to help them with expenses of working at a distant job site. He states this would include traveling to and from the job site, motel stays, living expenses, food and toiletries, and other daily necessities. He added that the per diem was not treated as taxable income by Fagen, and no payroll tax withholding was taken from per diem payments. He states that the per diem was not intended to constitute wages and it was not based on the number of hours worked. He states that the per diem was within guidelines set by the Internal Revenue Service. (Exhibit C-1:2)

Claimant stated that his motel bill was paid by Fagen during his employment in Iowa. The parties apparently agree that Neu was incorrect in stating that the per diem was to cover motel expenses.

According to his pay records in evidence, Glen worked 24.75 hours during the week ending on August 10, 2014 and was paid $320.00 for per diem. For the week ending on August 17, 2014, Glen worked 57.25 hours and was paid $458.00 for per diem. At the per diem rate of $80.00 per day, Glen apparently worked only 9.725 days for Fagen before his injury.

According to the calculations of his gross weekly rate, Glen's average gross weekly earnings were $1,943.88. (Ex. B-1) Apparently, defendants arrived at a full 13-week average using earnings from another employee. Given Glen's marital status and 3 exemptions, defendants assert a weekly compensation rate of $1,161.30 and this is the amount they are using to make the current weekly benefit payments.

Glen's attorney submitted two handwritten calculations on a copy of defendants' calculations. One calculation uses Glen's actual wages over a three-week period and arrives at a weekly compensation rate of $1,572.00. The other calculation just adds $665.00 in per diem payments to defendants' asserted gross weekly rate of $1,943.00 resulting in a weekly compensation rate of $1483.87. Both of these calculations make little sense, as claimant only worked over a two-week period and only a little over nine days in that time frame. Also, claimant was paid $778.00 in per diem, not $665.00.

In this post-hearing brief, claimant's attorney asserts that the only difference between the two rates was the inclusion of the per diem amounts. Apparently claimant is willing to accept that Glen's gross average weekly rate based on earnings of another employee is a least $1,943.88. However, he continues to argue for inclusion of the per diem amounts.

Although Glen testified that he was supposed to have been paid by Fagen for his travel to and from Texas at the rate of $.57 per mile, there is no evidence that this was

actually paid to him by Fagen. Also, there is no evidence that Glen pursued a wage/hour claim against Fagen for reimbursement of his travel expense.

Glen asserts that he used very little of the per diem payment for his actual meals or other travel expenses and considered most of the per diem he received from Fagan as actual income. He admits he did not declare the per diem amounts as income on his income tax returns.

Although Neu's affidavit states that the per diem amount of $80.00 per day is based on IRS rules, he did not explain this. I am not an expert on IRS rules, and simply stating the per diem payment is based on such rules is insufficient to establish that the per diem payments were related to actual expenses.

As will be explained in the next section of this decision, determining Glen's actual expenses and any profit from his per diem payments is necessary. Glen did not give any clear indication how much money he spent on food. Defendants assert we should use the amounts the State of Iowa pays its traveling employees for food and travel expenses. In the absence of any other evidence, I will accept that as a reasonable estimate of claimant's meal and travel expenses for the Fagen job. According to Exhibit D, the State reimburses employees up to $28.00 per day for meals and $.39 per mile. Glen testified without contradiction that his normal work week is seven days a week. If he had worked the full 13 weeks before the injury, he would have earned $7,280.00 in per diem. However, using the State reimbursement rate, he would have spent $2,548.00 for meals.

Claimant testified that the distance between his home in Texas and the job site in Iowa is 1,043 miles or 2,086 round trip. At the state reimbursement rate of $.39 per mile, the total cost of the round trip would be $813.54. Consequently, for a 13-week period before the work injury, Glen's total travel and food expenses using the State rules would be $3,361.54. Given the $7,280.00 he would have been paid for 13 weeks prior to hearing, he would have earned an additional $3,918.46. Dividing this amount by 13 provides additional average gross weekly earnings of $301.42. Therefore, Glen's average gross weekly earnings from his wages and net per diem payments are $2,245.30 ($1,943.88 plus $301.42).

Therefore, I find that Glen's average gross weekly earnings at the time of his work injury of August 12, 2014 were $2,245.30.

Apparently, defendants agreed to pay an IME expense of $2,495.00 to Sunil Bansal, M.D. from the Iowa Injury Institute. However, they withheld 72 percent. In a letter to claimant's counsel, Zurich, the insurance company, explained that this withholding is based on a notification from the IRS that the Tax ID Number Dr. Bansal provided in his bill does not match with IRS records and are required to withhold this amount if the taxpayer fails to respond to a 30-day notice by the IRS of the IRS mismatch. The letter goes on to explain what the taxpayer must do to obtain full payment. In his post-hearing brief, claimant's counsel simply states that he is unaware

of this happening before and demands full payment. There is no explanation whether or not Dr. Bansal has done the procedures set forth in the letter. One must remember that the insurer, Zurich, is not retaining the withholding money, but placing this in reserve as required by IRS rules regarding withholding. Even if Dr. Bansal did not comply with the procedures, he will get the money back upon filing his tax return for 2015.

CONCLUSIONS OF LAW

The fighting issue on rate is whether or not any or all of the per diem payments are to be considered as compensation for work performed and included in the gross weekly earnings in computing claimant's rate of weekly compensation. Claimant asserts that the rather lucrative $80.00 per day per diem in this case constitutes additional compensation for work performed because claimant did not have to submit receipts to obtain the payments, and clearly few people in Iowa would spend $80.00 a day on food alone. Defendants cite Iowa Code section 85.61(3) which exclude from the definition of "gross earnings" reimbursement of expenses and expense allowances.

Both parties cite prior agency decisions. The arbitration decisions establish no clear precedent. One decision excludes all per diems because they are paid regardless of the work performed. Thompson v. Seed & Grain Systems, Inc., File No. 1059299 (Arb. 1998). Another decision includes the per diem payment in the calculation of rate for a truck driver which were based on the number of miles driven. Sexton v. Midwest Continental, File No. 5039407 (Arb. May 17, 2013).

Claimant cites two appeal decisions from this agency both of which are over 20 years old. One appeal decision states that per diem payments which are based on the amount of work performed constitute compensation for rate purposes. Phillips v. C & K Transport, File No. 844999 (App. May 25, 1993). This holding is not applicable to the facts presented in this case because claimant's per diem was a flat $80.00 per day regardless of the hours worked. The more recent appeal decision cited states that if a portion of claimant's wages are designated expense allowances, defendants cannot exclude the expenses from calculating rate without establishing that they represent actual work-related expenses. Berst v. TTC, Inc., File No. 1053524 (App. November 30, 1994). The most recent appeal decision on per diem payments that I was able to locate excluded the per diem payments because defendants established that the amount paid was based on a rationale using IRS guidelines and other factors. Gialousis v. Kazanas, File No. 1155665 (App. January 2002).

Finally, in Bowers v. Premium Transportation Services, Inc., File No. 5040646 (Arb. November 5, 2013, aff'd on appeal by Comm'r) the agency included a portion of per diem payments in the gross wages to the extent they exceed actual expenses. This approach to per diem payments was recently affirmed on appeal by the Court of Appeals. Premium Transportation Staffing, Inc. and Dallas National Insurance Co. v. Alan Bowers, Court of Appeals of Iowa, Decision No. 15-0378, Filed October 14, 2015.

I found that defendants did not establish that the lucrative $80.00 per day per diem payments were related to actual expenses, especially since defendants paid the motel expenses. I believe it to be irrational to exclude these lucrative payments from claimant's gross weekly earnings in calculating rate. I believe it also irrational to consider the entire amount as wages because claimant obviously had to pay living expenses during his stay in Iowa.

The best approach is to include in gross wages, the difference between actual expenses and the per diem payments if this can be done in this record as was done in the Bowers case cited above. Claimant was too vague in stating how much of the $80.00 per day he utilized for his meal expenses and how much he actually spent to travel to and from Iowa. Defendants placed into the record the amount of meal and travel reimbursements that are made to State employees while they travel. As a traveling State employee myself I am aware of these reimbursement amounts, and while they are quite conservative, they are reasonable. Consequently, I found claimant to have spent a total of $28.00 per day in meal expense, which leaves an excess of $52.00 per day. Claimant testified without contradiction that he was scheduled to work seven days a week. Consequently, the excess per diem payments per week accounting just for meals expense is $364.00.

However, we must also include into claimant's expenses his travel expenses to and from Texas because he was not reimbursed for this separately. I found that the expense of traveling to and from Texas was $813.54 using the state mileage rate. The best way to include this into the per diem is to spread the travel expenses over the period of employment. However, he was only employed about nine days. I do not believe it would be fair to just spread this over such a short period of employment if we are to follow the guidelines in Iowa Code section 85.36(7) for determining gross weekly wages for claimant who has worked for the employer for less than 13 weeks. This section provides as follows on how the weekly earnings in such cases shall be computed:

> ...the employee's weekly earnings shall be commuted under subsection 6, taking the earnings, including shift differential pay, but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Defendants in this case used the earnings of a similar employee to arrive at weekly earnings over the preceding 13 weeks before the injury of $1,943.88 which claimant now has agreed to. Also, during that preceding 13 weeks, claimant would also have been paid $7,280.00 ($80.00 x 7 x 13) in per diem payments since he was to work seven days a week. During that same 13-week period he would have spent $2,548.00 ($28.00 x 7 x 13) on meals using the state reimbursement rate. Also, his total travel expense is $813.54 for this same period. Therefore, the excess per diem payments

over the meal and travel expenses for this 13-week period is $3,918.46 ($7,280.00 minus $2,548.00 minus $813.54) or $301.42 per week ($3,918.45 divided by 13).

Therefore, I found that Glen's average gross weekly earnings at the time of his work injury of August 12, 2014 was $2,245.30 ($1,943.88 plus $301.42). Based on the stipulated entitlement to marital status and three exemptions, the claimant's rate of weekly compensation is $1,307.26 per week.

Claimant is also seeking penalty benefits under Iowa Code section 86.13 for an unreasonable calculation of his weekly compensation rate. However, the law on the use of per diem payments in calculating the weekly compensation rate is not at all clear as set forth above. Although I disagree with defendants' refusal to include any portion of the per diem payments, their actions to do so were fairly debatable. City of Madrid v. Blasnitz, 742 N.W.2d 77 (2007). Therefore, claimant is not entitled to penalty benefits.

Claimant seeks full payment of the IME charge of Dr. Bansal under Iowa Code section 85.39. The defendant insurer asserts that IRS regulations require them to withhold all but 72 percent. Claimant has not cited any facts that would refute that claim. Claimant is entitled to the full amount, but this is subject to IRS regulations. This agency has no authority to pre-empt federal tax law. Therefore, full payment is denied at this time.

ORDER

1. Defendants shall pay to claimant past and future weekly benefits at the weekly rate of one thousand three-hundred seven and 26/100 dollars ($1,307.26).

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit for benefits previously paid.

3. Defendants shall pay interest on unpaid weekly benefits.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 9th day of November, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.