STATE OF VERMONT
DEPARTMENT OF LABOR

Pocher Willis

v.

Employer Solutions Staffing Group, LLC

Opinion No. 10-23WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. RR-54311

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Jeffrey T. Dickson, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUE PRESENTED:

Should the value of Claimant's hotel room and rental car be included when calculating her average weekly wage ("AWW")?

EXHIBITS:

Claimant's Statement of Undisputed Material Fact

Claimant's Exhibit 1:	Project Assignment Agreement
Claimant's Exhibit 2:	Vehicle Use Agreement
Claimant's Exhibit 3:	Welcome Letter
Claimant's Exhibit 4:	Employer's First Report of Injury (Form 1)
Claimant's Exhibit 5:	Hampton Inn Invoice
Claimant's Exhibit 6:	Emails showing Avis Rental Car Payment
Claimant's Exhibit 7:	Wage Statement (Form 25)
Claimant's Exhibit 8:	Amended Interim Order of Benefits

BACKGROUND:

There is no genuine issue as to the following facts:

1. Claimant is a resident of Texas. On or about August 20, 2021, she entered into a Project Assignment Agreement (the "Agreement") with Defendant, under which she was assigned to work as a machine operator for Barry Callebaut in Saint Albans, Vermont.

2. The Agreement provided for regular pay in the amount of $20.75 per hour, plus a $350.00 weekly per diem.

3. The Agreement also provided that Claimant "may be provided with transportation to and from the work site, such as air fare, living accommodations at a hotel or motel facility while working on assignment, and you may also be provided with a rental vehicle while working on assignment." (Claimant's Exhibit 1). It provided further as follows with respect to accommodations and rental vehicles:

> **<u>Hotel or Motel Accommodations</u>: Living arrangements are to be made with the comfort and safety of the employee in mind, but Customer company, in conjunction with STS Staffing, will make the sole determination as to location, cost, amenities, and duration of stay for any employee on assignment.**
>
> **<u>Rented Vehicles</u>: The use of a rented vehicle may be afforded employees who demonstrate a valid need for said transportation with the following limitations:**
>
> 1) **Employee must have a valid driver's license and be eligible for a rental, to include abiding by all rental company rules and policies.**
>
> 2) **Rented vehicle is for the sole use of employee and may not be used by others without the express written consent of Customer company and ESSG. Any violation of this policy will be grounds for immediate termination.**
>
> 3) **Vehicle is to be kept in good condition and not used outside the local area without the express written consent of Customer Company and ESSG. Consent to drive outside the local area (20-mile radius from Customer company) will not be unreasonably denied, but any fuel, tolls, fees, speeding tickets, parking ramp fees, parking meter fees, or parking tickets, etc. will be the sole responsibility of employee. Wanton destruction of vehicle, use of alcohol while driving, or other illegal activity involving use of the rented vehicle will be grounds for immediate termination.**

(*Id.*) (emphasis in original).

4. On or about August 24, 2021, Claimant received a welcome letter providing in relevant part that "Airfare, Hotel accommodations & Transportation will be provided" and that Claimant would receive a per diem of $50.00 per day, including days off, totaling $350.00 per week in addition to her hourly pay.

5. Claimant's job assignment in Vermont did not have a definite end date.

6. Claimant injured her right shoulder on September 25, 2021, while working at Barry Callebaut on behalf of Defendant. (Claimant's Exhibit 4). She continued to work with

restrictions at Barry Callebaut until her assignment was terminated on October 8, 2021, at which time she was provided a flight back to Texas.

7. The cost of Claimant's stay at the Saint Albans Hampton Inn during her assignment with Barry Callebaut was $89.00 per night. (Claimant's Exhibit 5). The cost of her rental car was $1,224.00 per month. (Claimant's Exhibit 6).

8. On November 12, 2021, Defendant filed a Wage Statement (Form 25) with the Department that included Claimant's hourly earnings and $350.00 weekly per diem payments, which resulted in an AWW calculation of $1,065.88 and initial compensation rate of $710.95. (Claimant's Exhibit 7).

9. Claimant contends that the value of her hotel room and rental car, totaling $908.00 per week, should be included in her AWW, which would result in an AWW calculation of $1,974.48 and an initial compensation rate of $1,316.98. (Claimant's Exhibit 8).

10. On March 14, 2022, the workers' compensation specialist assigned to this case issued an Amended Interim Order concluding that the value of the hotel and rental car must be included in the calculation of Claimant's AWW and compensation rate pursuant to 21 V.S.A. § 601(13). Defendant challenged that determination, and the present motion followed.

ANALYSIS:

1. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).

2. The monetary amount of disability benefits under Vermont's Workers' Compensation Act is based on a "compensation rate," which is in turn based on two-thirds of the injured worker's AWW, subject to maximum and minimum amounts as well as certain adjustments. *See* 21 V.S.A. §§ 642, 644, 646, 648; Workers' Compensation Rule 8.0000 *et seq*.

Statutory Provisions Relevant to Computing the AWW

3. The Act provides in relevant part as follows with respect to the computation of a worker's AWW:

> Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 26 weeks preceding an injury.

21 V.S.A § 650(a).

4. The Act defines "wages," in turn, as follows:

> "Wages" includes bonuses and the market value of board, lodging, fuel, and other advantages that can be estimated in money and that the employee receives from the employer as a part of his or her remuneration; but does not include any sum paid by the employer to his or her employee to cover any special expenses entailed on the employee by the nature of his or her employment.

21 V.S.A. § 601(13).

5. Thus, the value of "lodging" and "other advantages" that can be estimated in money are included, but "special expenses" are not.

Claimant's Hotel Room Was "Lodging"

6. Perhaps most straightforwardly, the Act expressly provides for the inclusion of "lodging" in computing an injured worker's AWW. 21 V.S.A. § 601(13); *Donovan v. AMN Healthcare*, Opinion No. 12-11WC (May 26, 2011) ("…a housing allowance is an element of wages actually paid as a part of the employee's remuneration.").

7. Defendant argues that because Claimant already had permanent housing in Texas, Defendant's provision of temporary housing in Vermont should not count as lodging for the purposes of computing her AWW. I see no basis in the statute for this interpretation. The hotel room that Defendant provided Claimant here was where she lived for the entire duration of her work in Vermont. I find it quite unambiguous that this constituted "lodging" within the definitions set forth in the Act.

Claimant's Rental Car Was an "Advantage" Whose Value Can Be Estimated in Money

8. When asked to determine whether a particular benefit constitutes as an "advantage" under Section 601(13), the Department has previously considered (1) whether it constitutes a "significant part" of the employee's compensation; (2) whether the employee derives true value from it or whether it "means little to the employee except as an enhancement to average weekly wage," and (3) whether it is subject to objective valuation. *Haller v. Champlain College Corp.*, Opinion No. 14-16WC (August 2016).

9. Applying these factors in *Haller*, the Department concluded that free tuition benefits pursuant to an institutional policy that provided tuition to college employees, their spouses, and dependent children constituted a part of the employee's wage. The Vermont Supreme Court affirmed. *Haller v. Champlain College*, 2017 VT 86.[1]

[1] *See also Gaboric v. Stratton Mountain*, Opinion No. 12-04WC (April 26, 2004) (value of free ski pass constituted advantage that is includable in AWW calculation); *Estate of Lyons v. American Flatbread,* Opinion No. 36-03WC (August 22, 2003) (value of massages provided by employer as employee benefit included in AWW computations).

10. Conversely, mere reimbursements for mileage according to federally established reimbursement rates do not count as "advantages" for this purpose, because they do not constitute a gain but merely make the claimant whole for losses attributable to fuel purchases and vehicle depreciation. *See Perrault v. Chittenden Cnty. Transportation Auth.*, 2018 VT 58.

11. All three of the *Haller* factors favor the inclusion of Claimant's rental car in computing her AWW here. The first and third factors are closely related: the value of the vehicle is capable of exact expression in money: $1,224 per month. Given that Claimant's AWW exclusive of the hotel and rental car was $1,065.88 per week, *see* Background ¶ 7, the value of her rental car reflects more than one quarter of her base annualized compensation.[2] I cannot call that amount insignificant. Thus, both the first and third factors favor including the value of the rental car in Claimant's AWW.

12. With respect to the second factor, Claimant derived true value from the rental car. Although Defendant imposed some limitations on her use of the vehicle, she was not limited to using it for work purposes. Nothing prohibited her from using the car for personal errands or recreational activities so long as it was within twenty miles of her worksite, and she could exceed that radius subject to Defendant's permission, which it agreed not to unreasonably withhold. In essence, it allowed her to live a normal life in Vermont.

13. Accordingly, I conclude that Claimant's use of the rental car met all three of the considerations set forth in *Haller* and therefore constituted an advantage under 21 V.S.A. § 601(13).

Neither the Hotel Room Nor the Rental Car Constituted a "Special Expense"

14. Defendant contends that both the hotel room and the rental car constituted "special expenses" under Section 601(13), and thus do not count in computing Claimant's AWW.

15. The Department has previously interpreted the term "special expense" to exclude certain travel allowances where the employee had to return unused portions of the allowance. *See, e.g., Benassi v. Skyline Corporation*, Opinion No. 31-05WC (May 3, 2005). The claimant in *Benassi* was a field technician whose primary job involved working on prefabricated houses owned by his employer throughout the northeastern United States. Because his work involved frequent travel away from home, his employer issued expense advances to pay for work-related expenses like lodging, materials, and meals. Importantly, he had to return unused portions of those advances to his employer along with reports and receipts, and his meal allowances were allowed only when he was on the road and expected to eat meals away from home. *Id.* If he arrived home before 5:00 p.m., he had to return his allowance for dinner that day. *Id.*,

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[2] $1,065.88 per week × 52 weeks per year = $55,425.76 annualized base compensation excluding rental car and hotel. $1,224 per month × 12 months per year = $14,688 annualized value of rental car. $14,688 ÷ 55,425.76 = 26.82%.

Conclusion of Law No. 5. Based on those facts, the Department concluded that the allowances were "special expenses" and not a part of the claimant's wages.

16. Defendant contends that both the hotel room and rental car at issue in this case are analogous to the meal allowances in *Benassi*. I disagree.

17. Importantly, Section 601 only excludes "special expenses ***entailed on the employee by the nature of [the claimant's] employment***." *See id.* (emphasis added). Thus, the relationship between the expense and the employment is critical to the analysis. This relationship is quite different in this case than in *Benassi*. Specifically, travel itself was an integral part of the employee's job duties in *Benassi*, and the employer's allowance system functioned essentially as a reimbursement system for job-related overnight travel, making it analogous to the mileage reimbursements at issue in *Perrault*, *supra.* In this case, by contrast, Claimant's job was as a machine operator at a fixed factory location in Vermont. While she had to travel to Saint Albans, Vermont to perform the work she was hired to do there, there is no evidence of work-related travel once she arrived. Nor is there any suggestion that travel was ever contemplated as part of the nature of her job itself.

18. Also unlike in *Benassi*, Claimant here had no obligation to account for or return any non-work-related portion of the cost of her rental car or hotel room. Despite some driving distance limitations, her relative freedom with respect to her use the hotel and rental car tip the scales in favor of treating these items as quality-of-life benefits rather than reimbursed business travel expenses.

19. For these reasons, the expenses Defendant paid here were not "entailed by the nature of [Claimant's] employment." *Cf.* 21 V.S.A. § 601(13). As such, I conclude that they do not fit the "special expenses" exclusion.

Inclusion of the Value of Claimant's Hotel Room and Rental Car Does Not Create an Unjust Windfall or Lead to Absurd Results

20. Defendant contends that including Claimant's hotel room and rental car in her AWW would create an unjust windfall to Claimant and lead to absurd results that the Legislature never intended. I disagree.

21. The purpose of the Workers' Compensation Act's AWW provisions is to "compute average weekly wages in such manner as is best calculated to yield a fair estimate of the worker's pre-injury rate of remuneration." *See Arman v. Vermont Mutual Insurance*, Opinion No. 03-23WC (February 7, 2023) (citing *Wetherby v. Donald P. Blake, Jr.*, Opinion No. 02-16WC (March 2, 2016)). This "does not necessarily mean granting the Claimant the most money possible," but rather seeks to "compensate workers fairly for injuries suffered as a result of their employment based on whatever remuneration scheme happened to be in place at the time." *Id.*

22. In this case, the hotel room and rental car were part of the offer that induced Claimant to accept employment in Vermont even though her primary residence was in Texas.

Whether she had a car and home in Texas or not, she would have had to procure housing and transportation in Vermont on her own but for Defendant's provision of these items as a part of her compensation package. This may have meant duplicating expenses, selling or otherwise disposing of these items in Texas, and/or driving rather than flying to Vermont. The inclusion of these benefits in Claimant's compensation package made it more attractive and more valuable. That, in turn, makes it only fair to consider them as part of Claimant's remuneration in computing her AWW.

ORDER:

Claimant's Motion for Summary Judgment is **GRANTED**. The value of her rental car and hotel room shall be included in computing her average weekly wage.

DATED at Montpelier, Vermont this 10th of April 2023.

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Michael A. Harrington
Commissioner