

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1402522

JEFFREY S. TRACY,

Employee,

Claimant,

vs.

PEOPLEASE CORPORATION,

Employer,

AND

NATIONAL INTERSTATE INSURANCE
COMPANY,

Carrier,

Defendants.

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SC Court of Appeals

DECISION AND ORDER

DATE OF HEARING:

Hearing held in Rock Hill, S.C. on September 8, 2014.

APPEARANCES:

Claimant appeared and represented by Tyler A. Bathrick, Esquire, of Stewart Law Offices, LLC of Rock Hill, South Carolina.

Defendants represented by Kelly F. Morrow, Esquire of McAngus Goudelock & Courie, L.L.C. of Columbia, South Carolina.

PURPOSE OF THE HEARING:

To determine all issues as set forth in Forms 50 and 51.

COMMISSIONER:

Commissioner Susan S. Barden

FILED:

October 21, 2014

STIPULATIONS

It is stipulated among the parties that:

1. Notice of the hearing was timely and properly served upon the parties of interest.
2. Venue is proper in Rock Hill, South Carolina.

APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act and Regulation of the South Carolina Workers' Compensation Commission, the following records were submitted into evidence:

The Claimant submitted the following evidence:

1. Riverview Medical Center, Dated 3/18/14-8/13/14 consisting of 84 pages.
2. Ortho Carolina, dated 5/6/14-8/7/14, consisting of 5 pages.
3. Metrolina Diagnostic Center, dated 4/19/14, consisting of 2 pages.
4. Select Physical Therapy, dated 4/24/14-6/6/14, consisting of 51 pages.
5. Rock Hill Family Medicine, dated 5/28/14, consisting of 1 page.
6. Wage Records of the Claimant, dated 2013-2014, consisting of 52 pages.
7. Correspondence to/from counsel, dated 5/12/14-7/11/14, consisting of 3 pages.
8. Personnel Records of the Claimant, submitted at the hearing and incorporated into the record by the Single Commissioner.

Claimant also submitted the cases of: *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003); *Stephen v Avins Construction Company*, 478 S.E.2d 74 (S.C. App. 1996); *Pilgrim v Eaton*, 703 S.E.2d 241 (S.C. App. 2010); for consideration.

The Defendants submitted the following evidence:

1. Portions of the Claimant's personnel file, dated 5/6/11-3/18/14, consisting of 8 pages.

2. Kentucky Uniform Police Traffic Collision Report, dated 3/14/14, consisting of 4 pages.
3. IRS wage information report, consisting of 5 pages.
4. PeopLease Employee Earnings--Summary wage information handed up at the hearing to the Single Commissioner without objection and incorporated as part of the record; dated 1/6/12-3/21/14, consisting of 3 pages.

STATEMENT OF THE CASE

Prior to the hearing, the parties agreed that the single issue for determination by the Single Commissioner in this matter was a determination of average weekly wage and compensation rate.

The Claimant took the position that his average weekly wage and compensation rate should amount to \$1,014.09 yielding a compensation rate of \$676.09. The Claimant takes the position that since his per diem expenses are subtracted from each pay check, out of his gross pay, the weekly deduction for his per diem expenses should be included in his overall wage calculation. The Claimant alleges his average weekly wage should be based on the per mile rate indicated in the personnel file. The Claimant was unable to find any South Carolina case law on this issue. However, he did find a North Carolina case, *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003), that the Claimant alleges addresses this issue. The Claimant also requested an underpayment of benefits for the period of temporary total disability benefits paid to the Claimant under the calculation of wages as submitted by the Defendants.

The Defendants asserted that the proper average weekly wage should be \$716.80 with the corresponding compensation rate of \$477.89. That computation is arrived at without use or inclusion of the per diem amount pursuant to the IRS guidelines for determination of income and use of the per diem. Also, the Defendants take the position that the per diem is not taxable

income and therefore cannot constitute wages and cannot be included in the overall figures utilized to configure the average weekly wage and compensation rate. As a result, the Defendants asserted that the average weekly wage and compensation rate as set forth on the Form 20 is proper and there is no underpayment of benefits owed to the Claimant.

EVIDENCE OF THE CASE

The Claimant testified that he is 42 years of age and resides in Chester, SC. (Hrg. Trans. p. 8-9). The Claimant has been employed with D&C trucking for 13 years. (Hrg. Trans. p. 9). The Claimant estimated about two years prior to his accident D&C trucking turned their wage information and employment status over to PeopLease. (Hrg. Trans. p. 9). In the conversion from D&C trucking to PeopLease, the Claimant testified he completed employment paperwork that set (noted as Exhibit Number 1 and retained in the Commission file) wherein his rate per mile was set at 34 cents per mile, \$15 per stop and \$50 lay over pay. (Hrg. Trans. p.15). The Claimant also acknowledged he elected to have his insurance deductions taken out on a pre-tax basis. (Hrg. Trans. p. 12). The Claimant testified that he turned in his per diem to the Company every week on a sheet based on how many days he was out on the road and what allowances he claimed on the road while he was out. (Hrg. Trans. p. 17). The Claimant testified his per diem was \$52 per day and that it was not taxed. (Hrg. Trans. p. 17-18). The Claimant testified that the remaining balance of his wages that were left over minus his per diem was taxed. (Hrg. Trans. p. 19). The Claimant further testified that he elected to have his per diem taken out of his checks so that he would not have to account for his per diem amounts on his personal tax returns. (Hrg. Trans. p. 19-20).

Monica Reese testified on behalf of the Defendants. Ms. Reese testified that she is the Vice President and General Counsel for PeopLease Corporation and has worked in that capacity

for 9 years handling all litigation including workers compensation matters across the U.S. for PeopLease. (Hrg. Trans. p. 22). Ms. Reese testified that PeopLease works as a professional employer meaning they are co-employers with their clients as to their payroll. (Hrg. Trans. p. 22). PeopLease processes payroll, remits taxes, provides W-2's, provides workers compensation insurance and assists in HR Benefits to their clients. (Hrg. Trans. p. 22-23). They share that same arrangement with D&C Trucking whom the Claimant works for. (Hrg. Trans. p. 23).

Ms. Reese testified that they receive information from D&C Trucking that Mr. Tracy would report as his actual mileage and per diem information from his logs. They then calculate the number of miles as provided from each of the logs remitted and then multiply by the stated rate per mile and arrive at their totals. (Hrg. Trans. p. 24). They take the total amount of payments to driver and then remove the per diem from that figure as non-taxable income (which is a maximum of \$59 per day for truck drivers). (Hrg. Trans. p. 25). You then take the load pay and according to the IRS you can't pay more than per diem then you would pay on the actual gross wages, the mileage pay and make sure that the tax implications are not offset incorrectly. (Hrg. Trans. p. 27) (Defendants APA #11)

Ms. Reese testified when the proper per diem deductions are taken out of the Claimant's wages and then you take out any other deductions that arrive at the proper taxable wages that are his listed W-2 wages reported to the government. (Hrg. Trans. p. 28-29). She testified that those wages are then used to determine average weekly wage and compensation rate. The per diem figures are added back into the Claimant's paycheck for actual payment to the Claimant for ease of payment but they are not included in the configuration for average weekly wage and compensation rate as they are not taxable wages to the Claimant and this explains why they look like they are taken out and then later added back in to his pay information. (Hrg. Trans. p. 29).

Ms. Reese testified that this single check payment system is customary in the trucking industry, but only the W-2 reportable wages are used to calculate the aww/cr. (Hrg. Trans. p. 30). Ms. Reese went on to testify that there are variations of this pay system depending on how any given trucking company elected to handle their pay. She testified that the specific election affects how they look at each individual when determining what taxable wages can be utilized in determining average weekly wage and compensation rate and that Mr. Tracy's wages were configured on D&C Trucking's specific set up and Mr. Tracy's individual elections. (Hrg. Trans. p. 33).

FINDINGS OF FACT

Based upon the testimony and evidence submitted by both parties, the undersigned Commissioner makes the following Findings of Fact:

1. Average weekly wage and compensation rate are governed by Section 42-9-260.
2. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
3. The undersigned has evaluated all of the evidence as submitted by the parties and is not persuaded by *Rhodes v. Hersek Express, Inc.*, 580 S.E.2d 430, (N.C. Ct. App. 2003).
4. I find as a matter of fact that the average weekly wage and compensation rate as set forth by the Defendants on the Form 20 is proper.
5. The Claimant's average weekly wage is \$716.80 with the corresponding compensation rate of \$477.89. This is based upon a proper calculation of the actual taxable wages, which does not include the non-taxable per diem that the Claimant received.

CONCLUSIONS OF LAW

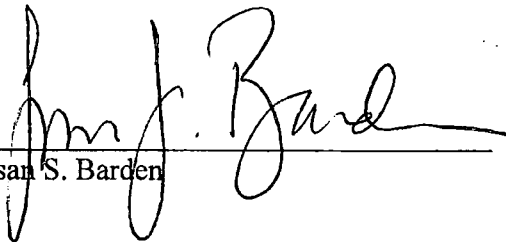
It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Average weekly wage and compensation rate is governed by Section 42-9-260.
2. The Claimant's average weekly wage is \$716.80 with a corresponding compensation rate of \$477.89 as based on the wages submitted by the Defendants and set forth on the Form 20.

ORDER

IT IS HEREBY ORDERED, that the greater weight of the evidence supports a finding that the Claimant's average weekly wage is \$716.80 with a corresponding compensation rate of \$477.89.

AND IT IS SO ORDERED.



Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).
October 21, 2014

By: Kristi Love, Administrative Assistant to Commissioner Barden