

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613845

STEPHEN KENO,
EMPLOYEE

CLAIMANT

PLANE TECHS,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 15, 2007

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE MICHAEL LEE
WRIGHT, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed June 22, 2007. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The respondent-employer is a staffing company specializing in recruiting and providing aviation mechanics to work for its clients on a temporary basis.
2. The claimant was hired by the respondent-employer's client, ReebAire of Hot Springs.
3. As of the date of the compensation injury, the claimant worked under a contract of hire with the

respondent-employer that paid him a base wage of \$7.50 per hour and overtime wages of \$24.00 per hour.

4. The claimant's domicile is in the State of Colorado and he resided temporarily in Arkansas solely for this job assignment.

5. As of the date of the compensable injury, the contract of hire between the claimant and the respondent-employer provided that the claimant was eligible for a per diem payment of \$120 for each day worked, for a maximum of \$600 per week, for the purpose of reimbursing the claimant for his duplicate expenses for meals, lodging and incidentals.

6. It was the respondent-employer's understanding that, according to federal law, any portion of the per diem payment which had not been spent on meals and lodging was to be returned to the respondent-employer or was to be reported by the claimant to the IRS as other income.

7. Though the contract of hire did not specify a particular number of hours per week for the claimant to work, the claimant was expected to work whenever the client had work available.

8. The respondents have controverted the claimant's entitlement to any indemnity benefits above a weekly rate of \$291 for total disability benefits and \$218 for permanent partial disability benefits.

9. As of June 8, the claimant has not returned to work and remains in his healing period.

10. The preponderance of the evidence provides that the claimant's per diem should be included in the calculation of his average weekly wage.

11. The claimant is entitled to the maximum temporary total disability rate for a 2006 injury.

12. Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded

herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the June 22, 2007 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the

provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant's \$120.00 per day per diem should be included in calculating the claimant's average weekly wage. Based upon my de novo review of the entire record, I find that this per diem did not amount to an advantage or economic gain to the claimant and should therefore be exclude from the average weekly wage calculation.

The claimant was hired to work for a base wage of \$7.50 per hour and an overtime wage of \$24.00 as an aircraft technician. The record reflects that such was the going rate for aircraft technicians in the Hot Springs area. However, as the claimant was not a resident of Arkansas, he was paid a per diem of \$120.00 per day, up to \$600.00 per week for his duplicate expenses of lodging, meals and incidentals. In my opinion this claim is clearly distinguishable from Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 976 S.W.2d 393 (1998) and Draper v. Dub Clenny Const., Full Commission opinion filed March 21, 2002 (E904378) which were relied upon by the Administrative Law Judge and now the majority to find that the per diem payments are to be included in the calculation of the claimant's average weekly wage. In both Eckhardt and Draper the employer paid the claimant a per diem in lieu of wages which was an additional benefit conveyed to the claimant for the work the claimant performed. The per diem was not merely a reimbursement for duplicate expenses as it is in this claim. Accordingly, I do not find either of these cases controlling. Therefore, I find that the claimant's average weekly wage should be calculated based upon fair and just method for all parties which

would be add the claimant's total earnings and to divide by the number of weeks he actually worked for respondents. This method produces an average weekly wage of \$434.00. As the majority includes the per diem payments which were not made in lieu of wages into their calculations, I must dissent from their finding.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner