

Ball, Donald

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) – Compensation

Per diem paid to a traveling employee need not be replaced during a period of disability and is not considered wages for purposes of calculating time-loss compensation.***In re Donald Ball, BIIA Dec., 19 14869 (2020)***

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: DONALD J. BALL

DOCKET NO. 19 14869

CLAIM NO. BC-66994

DECISION AND ORDER

Donald J. Ball was injured during the course of his employment. The Department of Labor and Industries allowed his claim and subsequently issued an order that established Mr. Ball's monthly rate of time-loss compensation benefits. The Department did not include the value of per diem reimbursements that Mr. Ball's employer paid him because he was working out of state on the date when he was injured. Mr. Ball appealed, contending that the per diem payments were wages. Our industrial appeals judge determined that the per diem reimbursements represented an economic gain for Mr. Ball and that the Department had to include their value in setting his wage replacement rate. The Department asks the Board that it affirm the Department's order. We hold that, in accordance with the Washington Supreme Court's holding in *Cockle v. Department of Labor & Indus.*¹ per diem reimbursements are not consideration of like nature such as board, fuel, housing, and health care benefits. We **AFFIRM** the Department's wage replacement order.

DISCUSSION

Timken Motor & Crane Services (Timken), which is a windmill repair business, employed Mr. Ball as a wind technician. On March 20, 2018, Mr. Ball's job required him to inspect and repair generators in the state of Wisconsin.

Timken paid employees whose job required them to work away from home \$980 a week per diem payments for rent and food. Mr. Ball said that while he was in Wisconsin, he spent \$460 a week for rent and \$140 a week for food—a total of \$600. Timken allowed Mr. Ball to keep the balance of the per diem payments. It deposited separate checks for Mr. Ball's hourly wages, which included overtime pay and approved per diem reimbursement, directly into his bank account.

Mr. Ball tore a muscle in his right arm on May 20, 2018, when the ratchet wrench that he was using to tighten a generator bolt broke and his arm hyperextended.

On April 3, 2019, the Department issued an order that established Mr. Ball's monthly rate of time-loss compensation based on his receipt of wages, including overtime pay, and health care benefits in the gross sum of \$5,904.20, and his status as a married individual who had two children.

¹ 142 Wn.2d 801 (2001).

1 The Department's calculations did not include the \$980 a week per diem reimbursements that Mr. Ball
2 was paid when he was working on the road.

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4 Relying on two of our decisions and orders, our industrial appeals judge reversed the
5 Department's order and remanded the claim to the Department to include the value of the per diem
6 reimbursements in setting Mr. Ball's wage replacement rate. Both of the decision and orders
7 predated the Washington Supreme Court's decision in *Cockle*.
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10 In relevant part, RCW 51.08.178(1) provides: "The term 'wages' shall include the reasonable
11 value of board, housing, fuel **or other consideration of like nature** received from the employer as
12 part of the contract of hire..."(Emphasis added).
13

14 In *Cockle*, the court required the Department to include the monthly amount that Ms. Cockle's
15 employer paid for her health care benefits. It interpreted the phrase, "other consideration of like
16 nature," as including non-fringe, readily identifiable, and reasonably calculable, benefits that are
17 critical to the protection of a worker's basic health and survival. We feel obligated to note that there
18 are post-*Cockle* Decision and Orders in which per diem expenses were included as part of the wage.
19 *In re Harvey L. Jennings*² and *In re Mark J. Zelinski*³ are examples. However, in these two decisions
20 there is no meaningful analysis why the travel per diem should be included in the wage. The focus
21 of the decisions was on other issues and not inclusion of per diem in the wage calculation. There
22 have been instances where we have included per diem post-*Cockle*, but in narrow circumstances not
23 present here. On the other hand, the court in *Gallo* applied the test from *Cockle* and declared benefits
24 that a worker need not replace during a period of disability are not wages for purposes of establishing
25 his or her time-loss compensation benefits.⁴
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27

28 In response to the supreme court's decision, effective June 15, 2003, the Department adopted
29 WAC 296-14-524. Among other things, it provides that in order to qualify as consideration of like
30 nature, the benefit that a worker receives must provide a necessity of life without which the worker
31 cannot survive a period of even temporary disability and it must be a benefit which virtually all
32 employees in every employment use to protect their immediate health and survival, while employed.
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34 The Department determined that Mr. Ball's per diem reimbursements did not qualify as
35 consideration of like nature within the meaning of RCW 51.08.178(1). We agree.
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45 ² Dckt. No. 06 12550 (February 5, 2007).
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47 ³ Dckt. No. 03 31756 (March 31, 2005).

⁴ *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470 at 489-490 (2005).

1 The per diem payments that Timken paid to Mr. Ball were intended to reimburse him for lodging
2 and food costs that he would not have incurred were he not working away from home and that it did
3 not pay when Mr. Ball was not working on the road. He would not need to replace travel
4 reimbursement while not working and not traveling for work due to his disability. The reimbursements
5 were not necessary to his basic health and survival and without which he could not survive a period
6 of temporary total disability.
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10 Other than its omission of the value of his sometimes-paid per diem reimbursements, Mr. Ball
11 did not challenge any of the calculations that the Department made when it established his time-loss
12 compensation rate. The Department properly calculated the rate. We affirm the Department's April 3,
13 2019 order.
14

15 **DECISION**

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17 In Docket No. 19 14869, the claimant, Donald J. Ball, filed a protest with the Department of
18 Labor and Industries on April 24, 2019. The Department forwarded it to the Board of Industrial
19 Insurance Appeals as an appeal. The claimant appeals a Department order dated April 3, 2019. In
20 this order, the Department affirmed the provisions of an order dated March 13, 2019, that established
21 Mr. Ball's monthly time-loss compensation benefit rate. This order is correct and is affirmed.
22

23 **FINDINGS OF FACT**

- 24 1. On July 23, 2019, an industrial appeals judge certified that the parties
25 agreed to include the Jurisdictional History in the Board record solely for
26 jurisdictional purposes.
- 27 2. Donald J. Ball injured his right arm on May 20, 2018, during the course of
28 his employment as a wind technician for Timken Motor & Crane Services
29 (Timken) while he was working in the state of Wisconsin.
- 30 3. On the date when he was injured and whenever Mr. Ball worked on the
31 road, Timken reimbursed him for his lodging and food costs through per
32 diem payments in the weekly sum of \$980.
- 33 4. Timken allowed Mr. Ball to retain the balance of any per diem
34 reimbursements it paid to him if he did not spend the entire sum for
35 lodging and food.
- 36 5. Timken did not pay Mr. Ball for lodging and food when he was not working
37 on the road for the business.
- 38 6. The Department established Mr. Ball's rate of time-loss compensation
39 based on his receipt of wages, including overtime pay, and health care
40 benefits in the gross sum of \$5,904.20 a month, and his status as a
41 married individual who had two children.
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- 1 7. The Department did not use Mr. Ball's receipt of per diem reimbursements
2 as a factor when it calculated his monthly rate of wage replacement
3 benefits.
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5 8. The per diem reimbursements that Timken paid Mr. Ball were not critical
6 to protect his basic health and survival and without which he could not
7 survive a period of temporary, total disability.

8 **CONCLUSIONS OF LAW**

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10 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
11 and subject matter in this appeal.
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13 2. Per diem reimbursements for travel expenses are not wages within the
14 meaning of RCW 51.08.178(1).
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16 3. The April 3, 2019 order of the Department of Labor and Industries is
17 correct and it is affirmed.

18 Dated: April 23, 2020.

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

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21 LINDA L. WILLIAMS, Chairperson

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23 JACK S. ENG, Member
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Addendum to Decision and Order
In re Donald J. Ball
Docket No. 19 14869
Claim No. BC-66994

Appearances

Claimant, Donald J. Ball, Self-Represented

Employer, Timken Motor & Crane Services, by Tommi Brode

Department of Labor and Industries, by Office of the Attorney General, per Vaidehi Mehta

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on February 21, 2020, in which the industrial appeals judge reversed and remanded the Department order dated April 3, 2019.