IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 2

WCC No. 2013-3116

DEELYNN OLSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION ON STIPULATED RECORD

Summary: Petitioner suffered injuries in a car accident which occurred while he was traveling to his jobsite in a co-worker's personal vehicle prior to the start of his shift. Petitioner argues that he was in the course and scope of his employment because the payment he received as "subsistence 'in lieu of any travel allowance per day worked'" is reimbursement for travel within the meaning of § 39-71-407(4)(a)(i), MCA, and therefore, this case falls under an exception to the going and coming rule. Petitioner also argues that the payment he received was not designated as an "incentive to work at a particular jobsite" within the meaning of § 39-71-407(4)(b), MCA.

Held: Petitioner was in the course and scope of his employment at the time of the accident. The Montana Supreme Court has held that a payment designated in a union contract as "subsistence per day worked in lieu of any travel time or travel allowance" is travel pay. Thus, an employee who receives such pay is within the course and scope of his employment while traveling to work. This case does not fall under § 39-71-407(4)(b), MCA, because the collective bargaining agreement did not "designate" Petitioner's payment as an "incentive to work at a particular jobsite."

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** A worker who received a payment of $61.50 per day subsistence "in lieu of any travel allowance" pursuant to the terms of a collective bargaining agreement received reimbursement for travel expenses within the meaning of § 39-71-407(4)(a), MCA (2011). Although

the “subsistence pay” was based neither on the actual miles traveled to and from work, nor the amount spent on travel expenses, this is unimportant.

Employment: Course and Scope: Travel. A worker who received a payment of $61.50 per day subsistence “in lieu of any travel allowance” pursuant to the terms of a collective bargaining agreement received reimbursement for travel expenses within the meaning of § 39-71-407(4)(a), MCA (2011), and was therefore within the course and scope of employment when he was in an automobile accident on the way to work prior to the start of his shift.

Employment: Course and Scope: Coming and Going. A worker who received a payment of $61.50 per day subsistence “in lieu of any travel allowance” pursuant to the terms of a collective bargaining agreement received reimbursement for travel expenses within the meaning of § 39-71-407(4)(a), MCA (2011), and was therefore within the course and scope of employment when he was in an automobile accident on the way to work prior to the start of his shift.

Employment: Course and Scope: Travel. The fact that the “subsistence pay . . . in lieu of any travel allowance” a worker received was neither based on the actual miles traveled to and from work, nor the amount the worker spent on travel expenses, is not important. The key factor to consider is whether travel was singled out in the employment contract, and in this instance, it was. Therefore, the worker was within the course and scope of his employment when he was in an automobile accident on the way to work prior to the start of his shift.

Employment: Course and Scope: Coming and Going. The fact that the “subsistence pay . . . in lieu of any travel allowance” a worker received was neither based on the actual miles traveled to and from work, nor the amount the worker spent on travel expenses, is not important. The key factor to consider is whether travel was singled out in the employment contract, and in this instance, it was. Therefore, the worker was within the course and scope of his employment when he was in an automobile accident on the way to work prior to the start of his shift.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Under the plain language of § 39-71-407(4)(b), MCA (2011), a payment for travel falls under the travel reimbursement

exception to the going and coming rule unless the written document designates the payment as an "incentive" and sets forth the particular jobsite. In this case, the contract did not meet those requirements. Therefore, the worker was in the course and scope of his employment when he was in an automobile accident on the way to work prior to the start of his shift.

Employment: Course and Scope: Coming and Going. Under the plain language of § 39-71-407(4)(b), MCA (2011), a payment for travel falls under the travel reimbursement exception to the going and coming rule unless the written document designates the payment as an "incentive" and sets forth the particular jobsite. In this case, the contract did not meet those requirements. Therefore, the worker was in the course and scope of his employment when he was in an automobile accident on the way to work prior to the start of his shift.

Contracts: Construction: Plain Meaning. Under the plain language of § 39-71-407(4)(b), MCA (2011), a payment for travel falls under the travel reimbursement exception to the going and coming rule unless the written document designates the payment as an "incentive" and sets forth the particular jobsite. In this case, the contract did not meet those requirements. Therefore, the worker was in the course and scope of his employment when he was in an automobile accident on the way to work prior to the start of his shift.

¶ 1 On December 10, 2013, pursuant to the stipulation of the parties, the Court deemed this matter submitted for resolution on a stipulated record consisting of seven exhibits, two depositions, and an agreed statement of facts.[1]

¶ 2 Issues Presented: The Court restates the parties' issues for resolution as follows:

Issue One: Whether the subsistence pay of $61.50 per day was reimbursement for travel expenses under § 39-71-407(4)(a), MCA (2011).

Issue Two: Whether the subsistence pay of $61.50 per day was designated as an incentive to work at a particular jobsite under § 39-71-407(4)(b), MCA (2011).

[1] E-mail Correspondence Between Court and Counsel – Clarification of "the Record," Docket Item No. 24.

Issue Three: Whether the August 10, 2012, motor vehicle accident occurred on the employer's premises.

Issue Four: Whether Petitioner is entitled to reasonable costs.[2]

STIPULATED FACTS[3]

¶ 3 Petitioner Deelynn Olson was a union electrician working for Colstrip Electric, Inc. (CEI), at its wind farm near Choteau, Montana, when he was involved in a single-car accident. Olson was a passenger. The driver lost control of the vehicle and it rolled. The driver owned the vehicle; it was not provided by the employer. Neither alcohol nor drugs played a role in the accident.

¶ 4 The motor vehicle accident happened on August 10, 2012, at approximately 6:30 a.m. while Olson was traveling to work. Olson's shift started at 7:00 a.m. each day with a stretch and flex program performed at the job staging area. Olson was not being paid his hourly wage at the time of the motor vehicle accident.

¶ 5 The accident occurred on Hay Lake Road, after Olson crossed over a portion of the Rim Rock Wind Farm approximately five to eight miles away from the job staging area where Olson clocked in each day. Hay Lake Road runs through the southwest part of the wind farm and provides access to eight of the wind towers.

¶ 6 At the accident site, Hay Lake Road is a gravel county road that was not in very good condition due to the amount of traffic on the road from the wind farm project. Hay Lake Road was used by CEI employees to access the wind farm project.

¶ 7 CEI and the IBEW Local Unions entered into the IBEW MidWest Wind Turbine Agreement, which states in Article IX, § 11.04:

> The minimum hourly rate of wages shall be determined by the Collective Bargaining Agreements in the jurisdiction of the Local Union(s) in whose jurisdiction wind turbines will be erected.

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[2] Petitioner's Motion for Summary Judgment and Supporting Brief (Olson's Opening Brief) at 3-4, Docket Item No. 17. Although Olson captioned his submission as a motion for summary judgment, both parties clarified in later filings that the parties intended to submit this case for decision on a stipulated record and agreed statement of facts and that the captioning of Olson's opening brief as a summary judgment motion was in error. *See* Montana State Fund's Reply Brief (State Fund's Reply Brief) at 1-2, Docket Item No. 21; Petitioner's Reply Brief (Olson's Reply Brief) at 1, Docket Item No. 23.

[3] Facts are taken from the Statement of Agreed Facts and Issues of Law, Docket Item No. 20, unless otherwise noted.

¶ 8 Article III of the IBEW MidWest Wind Turbine Agreement requires that any change or supplement made to the agreement "shall be reduced to writing, and signed by the parties hereto."

¶ 9 The location of the Rim Rock Wind Farm placed it within the jurisdiction of the Helena/Great Falls Local Union 233 of the IBEW. The Collective Bargaining Agreement (CBA) applicable to that Local and in effect on August 10, 2012, states in relevant part at § 3.08:

> (a) The U.S. Post Office located at 7200 N. Harris Street, Helena, Montana and 215 First Ave. N., Great Falls, Montana hereafter referred to as the "Post Office" shall be the reference point to establish all mileage, subsistence and a Free Zone.
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> (b) All of the area within an eight (8) mile radius of the Post Office is a Free Zone. No travel time or travel allowance shall be required of the Employer when employees are directed to report to a shop or job located within the Free Zone.
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> (c) When an employee is required to report to the shop or is removed from a job to which he has reported, the Employer shall pay for traveling time and furnish transportation from shop to job, job to job and job to shop.
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> (d) When employees are directed to report to a job located between an eight (8) mile and fifty (50) mile radius of the Post Office they shall be paid a Travel Allowance equal to the Federal Government mileage reimbursement for that year, per road mile, each way per day "in excess of the Free Zone."
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> (e) On all jobs in excess of fifty (50) miles from the Post Office the employees shall be paid, effective 06-01-2012, ***$61.50 per day subsistence "in lieu of any travel allowance per day worked. . . ."***[4]

¶ 10 Olson received $61.50 per day, $369 per week, in subsistence pay while he worked on the Wind Turbine Project.

¶ 11 Michael Verlyn Ruger, Safety Manager for CEI, testified that his employer does not pay travel pay on top of the subsistence pay in the CBA, and that it is the view of his employer that "subsistence pay" is an incentive to get workers to take certain undesirable jobs.[5]

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[4] Emphasis added.

[5] Ruger Dep. 6:21-23; 10:5 – 11:17.

¶ 12 Olson testified that he did not consider the $61.50 daily subsistence pay to be an incentive because it merely helped even out his pay with local workers because it was more expensive for him to work at a site which required him to travel further from home.[6]

¶ 13 On October 5, 2012, Olson filed his First Report of Injury or Occupational Disease,[7] which Respondent Montana State Fund (State Fund) received on October 18, 2012, and denied on November 9, 2012, on the grounds that Olson's injury occurred outside the course and scope of his employment.

ANALYSIS AND DECISION

¶ 14 This case is governed by the 2011 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Olson's motor vehicle accident.[8]

¶ 15 At issue is whether Olson was within the course and scope of his employment at the time of the August 10, 2012, motor vehicle accident. Olson claims that he was within the course and scope of his employment either because he was reimbursed for travel expenses as part of his benefits, or because he had already arrived at his employer's premises. State Fund maintains that Olson was not reimbursed for travel expenses and that he had not yet reached his employer's premises.

Issue One: Whether the subsistence pay of $61.50 per day was reimbursement for travel expenses under § 39-71-407(4)(a), MCA (2011).

¶ 16 Under the "going and coming rule," an employee traveling to and from work is not within the course and scope of employment.[9] An exception to the rule occurs when the employee receives reimbursement for travel expenses.[10] This rule and this exception are now codified at § 39-71-407(4)(a), MCA (2011), which states:

> (4)(a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
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> (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or

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[6] Olson Dep. 29:3 – 30:2.

[7] Ex. 2 to Statement of Agreed Facts and Issues of Law.

[8] *Ford v. Sentry Cas. Co.,* 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687; § 1-2-201, MCA.

[9] *See, e.g.*, *Heath v. Montana Mun. Ins. Auth.*, 1998 MT 111, ¶¶ 11-13, 288 Mont. 463, 959 P.2d 480.

[10] *Id.*

> lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
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> (ii) the travel is required by the employer as part of the employee's job duties.

The Montana Supreme Court has explained that this statute "encompasse[s] the historical 'going and coming' rule as well as the exceptions which [have] evolved to it over the years."[11]

¶ 17 Olson relies upon *McMillen v. Arthur G. McKee and Co.*[12] and *Gordon v. H.C. Smith Construction Co.*[13] and argues that the $61.50 he received "as subsistence 'in lieu of any travel allowance per day worked'" was reimbursement for travel expenses and that his case falls within the exception to the going and coming rule.[14] State Fund disagrees, arguing that Olson's subsistence pay was not reimbursement for any travel expenses, as he received it "in lieu of" travel pay.[15] Pursuant to *McMillen* and *Gordon*, the Court agrees with Olson.

¶ 18 In *McMillen*, the McMillen brothers lived in Butte and travelled to Anaconda for work.[16] Under a schedule in a union contract, the McMillens each received $4 per day as "travel pay or subsistence," because they lived between 25 and 50 miles from Anaconda.[17] Relying upon the common-law travel pay exception to the going and coming rule – which provides that a worker is "usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job"[18] – the court held that the brothers were within the course and scope of their employment when they were in a single-vehicle accident on their way to

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[11] *Heath*, ¶ 13 (citing *State Comp. Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188-89 (1993)). *See also Bentz v. Liberty Northwest,* 2002 MT 221, ¶ 13, 311 Mont. 361, 57 P.3d 832 (citing *James*, 257 Mont. 348, 849 P.2d 187).

[12] *McMillen*, 166 Mont. 400, 533 P.2d 1095 (1975).

[13] *Gordon*, 188 Mont. 166, 612 P.2d 668 (1980).

[14] Olson's Opening Brief at 7.

[15] Montana State Fund's Opening Brief (State Fund's Opening Brief) at 5, Docket Item No. 19.

[16] *McMillen*, 166 Mont. at 402, 533 P.2d at 1096.

[17] *Id*.

[18] *McMillen,* 166 Mont. at 406, 533 P.2d at 1098 (citing 1 Larsen, *Workmen's Compensation Law*, § 16.20 *et seq*.).

work.[19] The court rejected the insurer's argument that an employee must be paid his hourly wage while traveling for the payment to be considered travel pay:

> Although benefit to the employer is an important factor in determining compensability, the payment of hourly wages for travel time is not necessarily a universal condition precedent. In the instant case, the union contract singled out for special consideration a travel allowance and testimony at the hearing indicated it was paid as an incentive to get men out on the job. This contractual fact supports the finding of the Division and the district court that the travel allowance was for the benefit of the employer within previous holdings of this Court.[20]

¶ 19 In *Gordon*, the claimant was a union electrician from Butte who stayed in a hotel in Lewistown while working near Denton.[21] His employment was controlled by a union contract under which he received no travel pay for work within four miles of Great Falls and mileage for work between four and 54 miles from Great Falls. For jobs more than 54 miles from Great Falls, Gordon received $22 in "*subsistence per day worked in lieu of any travel time or travel allowance*."[22] Gordon died in a car accident while traveling as a passenger in a co-worker's truck; the accident occurred after they left the Denton Bar, where they had socialized for several hours after their work shift.[23]

¶ 20 The Montana Supreme Court first considered the question, "Did the payment to decedent of $22 per day 'subsistence' according to the labor contract under which he was employed constitute travel pay so as to entitled claimant to workers' compensation benefits under an exception to the 'going and coming' rule?"[24] Relying on *McMillen*,[25] the court held "subsistence . . . in lieu of . . . travel allowance" is travel pay and that an employee who receives such pay is within the course and scope of the employment while traveling to and from work. The court explained:

> The facts in *McMillen* were almost identical to those in this case. Employees were paid a travel allowance based on a sliding scale, not an actual mileage rate, and the parties had referred to the pay as "*travel pay or subsistence"* while here the reference is to "subsistence . . . in lieu of . .

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[19] *McMillen,* 166 Mont. at 407, 533 P.2d at 1098.

[20] *McMillen*, 166 Mont. at 405-06, 533 P.2d at 1098.

[21] *Gordon*, 188 Mont. at 167-68, 612 P.2d at 669.

[22] *Gordon*, 188 Mont. at 169, 612 P.2d at 669-70 (emphasis in original).

[23] *Gordon*, 188 Mont. at 168-69, 612 P.2d at 669.

[24] *Gordon*, 188 Mont. at 170, 612 P.2d at 670.

[25] *McMillen*, 166 Mont. 400, 533 P.2d 1095.

> . travel allowance." In both cases the payment is for travel, no matter what the parties may have selected to call it. In other words, the superficial distinctions in the contract or the labels attached to benefits contained therein are not the primary consideration. Because the union contract singles out for special consideration a travel allowance and it is paid as an incentive to get men onto jobs and results in a reasonable benefit to an employer, then while the employee is "*traveling*" en route to or from work, any injury is within the exception and arises out of and in the course and scope of employment.[26]

The court noted that although the union agreement used the word "subsistence," "it is clear from the context that both parties meant travel pay." The court explained:

> The test to be applied to determine coverage under the exception to the rule really becomes a simple matter of substance over form. In this instance there can be no question that the underlying consideration singled out in the contract was travel and coverage is proper.[27]

¶ 21 Under *McMillen* and *Gordon*, the $61.50 per day that Olson received as "subsistence in lieu of travel" is reimbursement for travel expenses. As in *McMillen*, Olson received, under his CBA, a set amount per day as "subsistence" in addition to his hourly wage. The contractual language in this instance is nearly identical to the language at issue in *Gordon*. Both contracts provided for a work zone close to Great Falls with no travel payment, an intermediate zone where the employees received a per-mile travel payment, and a zone where the employees received a set amount as "subsistence" that was "in lieu of" a travel allowance.[28] There is no meaningful way to distinguish *McMillen* or *Gordon* from the case at bar. Thus, like the claimants in *McMillen* and *Gordon*, Olson was within the course and scope of his employment at the time of the accident, as he received a travel allowance and was traveling to work at the time of the accident.

¶ 22 State Fund, however, argues that the Montana Supreme Court wrongly decided *Gordon* because it "failed to consider the meaning of the phrase 'in lieu of'" and because "the *Gordon* Court did not consider the appropriate legal standard to be used in the interpretation of the terms of a collective bargaining agreement."[29] State Fund maintains, "It is readily apparent that the *Gordon* Court did not believe that it was bound

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[26] *Gordon*, 188 Mont. at 171, 612 P.2d at 670-71 (emphasis in original).

[27] *Gordon*, 188 Mont. at 172, 612 P.2d at 671.

[28] *Gordon*, 188 Mont. at 169-70, 612 P.2d at 669-70.

[29] State Fund's Opening Brief at 6, n.1; State Fund's Reply Brief at 3.

by the terms of the collective bargaining agreement when it concluded that the 'superficial distinctions in the contract or the labels attached to benefits contained therein are not the primary consideration.'"[30] State Fund urges this Court to disregard *Gordon* and rely on more recent cases which state that collective bargaining agreements are to be interpreted by their plain language.[31] State Fund argues that the phrase "in lieu of" means "instead of or in place of; in exchange or return for."[32] Thus, according to State Fund, under the plain language of the union contract, "subsistence pay is **not** a travel allowance as it is paid instead of a travel allowance."[33]

¶ 23 Although State Fund's argument is well-reasoned, this Court is bound to follow decisions from the Montana Supreme Court.[34] *Gordon* is still good law. Even though other cases arguably call into doubt the manner in which the *Gordon* Court interpreted the union contract, this Court must follow and apply *Gordon*.[35]

¶ 24 State Fund also argues that in Olson's case, the subsistence pay is not a travel allowance because all workers who worked at that jobsite received it, regardless of whether they traveled a long distance to get there. State Fund does not dispute that Olson's employment necessitated his travel. However, it contends that since no nexus exists between his subsistence pay and actual travel expenses, the subsistence pay is not "reimbursement for the costs of travel, gas, oil, or lodging" within the meaning of § 39-71-407(4)(a)(i), MCA.[36]

¶ 25 However, as Olson points out, the Montana Supreme Court rejected this argument in *Ellingson v. Crick Co*.[37] Under the union contract at issue in *Ellingson*, the employees received $5 per day as a "travel allowance" to travel to a highway construction project near Garrison, regardless of how far away from the construction site they lived.[38] The court rejected the insurer's argument that the case was distinguishable from *McMillen* because the claimant was paid $5 per day regardless of

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[30] State Fund's Reply Brief at 3.

[31] State Fund's Opening Brief at 5; State Fund's Reply Brief at 3 (citing *Klein v. State*, 2008 MT 189, ¶ 20, 343 Mont. 520, 185 P.3d 986; *Winchester v. Mountain Line*, 1999 MT 134, ¶ 28, 294 Mont. 517, 982 P.2d 1024).

[32] State Fund's Opening Brief at 5.

[33] *Id*. (emphasis in original).

[34] *Fellenberg v. Transportation Ins. Co*., 2004 MTWCC 29, ¶ 57. *See also Stavenjord v. Montana State Fund*, 2004 MTWCC 62, ¶ 17, n.6.

[35] *See Hardgrove v. Transportation Ins. Co*., 2003 MTWCC 57, ¶ 22 (ruling that this Court was bound to follow binding precedent even though more recent cases undermined the binding precedent).

[36] State Fund's Opening Brief at 6.

[37] *Ellingson*, 166 Mont. 431, 533 P.2d 1100 (1975).

[38] *Ellingson*, 166 Mont. at 432-33, 533 P.2d at 1101.

how far he had to travel to reach the jobsite and held that the claimant was in the course and scope of his employment when he was injured in a car accident while traveling to work from his home in Helena in his personal vehicle.[39] The court explained:

> The argument advanced for distinguishing this case from *McMillen* is the acknowledged differences in the contractual methods of computing the respective travel allowances. In *McMillen*, the computation was predicated upon the miles actually traveled by the individual employee, while here it is based on the distance from the jobsite to the nearest county courthouse. The disparity results in *McMillen* employees receiving varying amounts of compensation depending on the distance traveled, while the employees here all received a uniform amount.
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> We cannot see where that distinction varies the applicability of the test enunciated in *McMillen*. The fact that the travel allowance here was based on a distance other than mileage between residence and jobsite is not important. The union contract singled out transportation as the subject of a specific allowance. When transportation is thus singled out in the employment contract, the travel to and from work is brought within the course of employment. Injuries sustained enroute are therefore compensable.[40]

¶ 26 The fact that that subsistence pay in this case was not based on the actual miles that Olson traveled to and from work each day, nor on the amount he spent on other travel expenses is, in the words of *Ellingson*, "not important." This Court has recognized that the "key factor" to consider is whether travel is singled out in the employment contract.[41] Since the CBA under which Olson worked singled out travel as in *McMillen*, *Ellingson*, and *Gordon*, Olson was within the course and scope of his employment at the time of the accident under § 39-71-407(4)(a), MCA.

> **Issue Two: Whether the subsistence pay of $61.50 per day was designated as an incentive to work at a particular jobsite under § 39-71-407(4)(b), MCA (2011).**

¶ 27 Section 39-71-407(4)(b), MCA, states:

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[39] *Ellingson*, 166 Mont. at 433-34, 533 P.2d at 1101-02.

[40] *Ellingson*, 166 Mont. at 434, 533 P.2d at 1101-02 (citing *McMillen*, 166 Mont. 400, 533 P.2d 1095; 1 Larsen, *Workmen's Compensation Law*, § 16.30.)

[41] *Borglum v. Hartford Ins. Co. of the Midwest*, 2002 MTWCC 16, ¶ 8.

> (b) A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but ***is designated as an incentive to work at a particular jobsite*** is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.[42]

¶ 28 State Fund argues that the subsistence pay Olson received was an "incentive" to get him to work in a remote location and it therefore falls under the statutory exclusions of § 39-71-407(4)(b), MCA.[43] Olson argues that the pay was not "designated as an incentive to work at a particular jobsite" in the CBA and, therefore, the payment was reimbursement for travel.[44] The Court agrees with Olson.

¶ 29 When interpreting a statute, this Court must apply plain language and neither insert what has been omitted nor omit what has been inserted.[45] Under the plain language of § 39-71-407(4)(b), MCA, a payment for travel falls under the travel reimbursement exception to the going and coming rule unless the written document providing for such payment designates the payment as an "incentive" ***and*** sets forth the "particular jobsite." The CBA at issue does not meet either of these requirements. It does not designate the payments as an "incentive." Rather, it designates the payments as "subsistence in lieu of travel" – a designation which the Montana Supreme Court held to be reimbursement for travel in *Gordon*.[46] In addition, the CBA does not designate the payments as an "incentive" to work at the "particular jobsite" of Rim Rock Wind Farm. Under the terms of the CBA, Olson would receive the subsistence payment at any jobsite that was more than 54 miles from Great Falls – not just the Rim Rock Wind Farm.

¶ 30 Although State Fund presents three arguments in support of its claim that the subsistence payments should be deemed an incentive payment under § 39-71-407(4)(b), MCA, the Court has not found its arguments persuasive.

¶ 31 First, relying upon the legislative history, State Fund argues that the 2003 Montana Legislature intended to legislatively overrule *Gordon* when it enacted § 39-71-407(4)(b), MCA, and that "the subsistence pay received by Olson under the collective bargaining agreement was not the type of payment that would bring his travel to the

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[42] Emphasis added.

[43] State Fund's Opening Brief at 6-7; State Fund's Reply Brief at 3.

[44] Olson's Opening Brief at 7-8.

[45] § 1-2-101, MCA.

[46] *Gordon*, 188 Mont. at 171, 612 P.2d at 670-71.

worksite within the course and scope of employment."[47] However, this Court finds it unnecessary to resort to the legislative history, as § 39-71-407(4), MCA, is clear on its face. "If the language [of the statute] is clear and unambiguous, no further interpretation is required, and [the court] will resort to legislative history only if legislative intent cannot be determined from the plain wording of the statute."[48] While State Fund points to three comments in the legislative history that arguably support its position, two of which were made by a supporter who was not a Legislator, these comments do not override the plain language of § 39-71-407(4)(b), MCA. The legislative history shows that the Legislature intended to create a way an employer could provide a payment to defray the costs of travel to a remote jobsite without bringing the employee within the course and scope of employment while traveling. However, the CBA at issue in this case does not meet the requirements of § 39-71-407(4)(b), MCA.

¶ 32 Moreover, nothing in the legislative history leads this Court to conclude that the Montana Legislature intended to legislatively overrule *Gordon*. The Legislature "is presumed to act with deliberation and with full knowledge of all existing laws on a subject."[49] The Supreme Court decided *Gordon* in 1980, more than 23 years before the Montana Legislature enacted § 39-71-407(4)(b), MCA. Thus, if the 2003 Montana Legislature intended to change the law of *Gordon*, it would have included the phrase "or as subsistence" so that § 39-71-407(4)(b), MCA, would say, "A payment made to an employee under a collective bargaining agreement . . . that is not wages but is designated as an incentive to work at a particular jobsite ***or as subsistence*** is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling." As set forth above, it is not this Court's role to insert into a statute what has been omitted.[50]

¶ 33 State Fund's second argument is that the testimony of Michael Verlyn Ruger, CEI's Safety Manager, establishes that CEI considered the "subsistence pay" made pursuant to the CBA to be an "incentive." Under the plain language of § 39-71-407(4)(b), MCA, it is irrelevant whether the employer unilaterally "considers" the payment to be an incentive; the relevant inquiry is whether the contract or other written document states that the payment is an "incentive" to work at "a particular jobsite." This Court may not look beyond the contract or written document to make this determination.

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[47] State Fund's Opening Brief at 6-7.

[48] *Clarke v. Massey*, 271 Mont. 412, 416, 897, P.2d 1085, 1088 (1995) (citation omitted).

[49] *Montana Sports Shooting Ass'n Inc. v. State*, 2008 MT 190, ¶ 41, 344 Mont. 1, 185 P.3d 1003 (citation omitted).

[50] § 1-2-101, MCA.

¶ 34 Finally, relying upon *Dale v. Trade Street, Inc*.,[51] State Fund states, "The Supreme Court has considered subsistence pay made in lieu of travel to be an incentive to get workers to a remote worksite." It argues that Olson's subsistence payment was "a designated incentive to work payment within the meaning of section 39-71-407(4)(b), MCA (2011)."[52] State Fund's reliance on *Dale* is misplaced.

¶ 35 Dale was driving a load of lumber from Townsend to Michigan.[53] Dale's employer paid him wages of $0.21 per mile, plus $0.06 per mile as "subsistence," and additional "subsistence" for meals, lodging, and other travel costs.[54] While en route, Dale parked the truck at a truck stop outside of Miles City and went into town in his brother's personal vehicle.[55] Dale suffered injuries in a single-car accident which occurred while his brother was driving him back to his truck several hours later while they were both intoxicated.[56]

¶ 36 The court held that Dale's claim was not compensable because he had substantially deviated from his employment and "had not returned to the point of deviation from the path of duty."[57] In rejecting this Court's determination that the case was controlled by *Gordon* because Dale was paid subsistence in addition to a wage, the court found *Gordon* distinguishable. The court explained:

> In this case, although Dale received a subsistence allowance and was paid for each mile he traveled, he was not paid for traveling to or from work. He was paid for the actual miles traveled *during* work. Unlike *Gordon*, it was not an incentive to get him to his place of employment. Also unlike *Gordon*, Dale's subsistence pay was not an incentive to get him to work in a remote location. We conclude that the Workers' Compensation Court was incorrect in holding that *Gordon* was controlling here.[58]

¶ 37 Contrary to State Fund's argument, *Dale* does not control the outcome of this case. This case falls squarely under *Gordon*, and not *Dale*, because Olson was paid for traveling to and from work, not for miles driven during work. Furthermore, although the

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[51] *Dale*, 258 Mont. 349, 854 P.2d 828 (1993).

[52] State Fund's Opening Brief at 6.

[53] *Dale*, 258 Mont. at 351, 854 P.2d at 829.

[54] *Dale*, 258 Mont. at 357-58, 854 P.2d at 833.

[55] *Dale*, 258 Mont. at 351, 854 P.2d at 829.

[56] *Id*.

[57] *Dale*, 258 Mont. at 355-56, 854 P.2d at 832.

[58] *Dale*, 258 Mont. at 355, 854 P.2d at 831 (emphasis in original).

Supreme Court recognized that a subsistence payment serves "as an incentive to get men onto jobs,"[59] a payment designated as "subsistence . . . in lieu of . . . travel allowance" for any jobsite more than 50 miles from Great Falls does not meet the requirements of § 39-71-407(4)(b), MCA. As set forth above, the issue under the plain language § 39-71-407(4)(b), MCA, is whether the document providing for the payment both designates the payment as an "incentive" and sets forth the "particular jobsite." Since the CBA does neither, § 39-71-407(4)(b), MCA, is not implicated here.

Issue Three: Whether the August 12, 2012, motor vehicle accident occurred on the employer's premises.

¶ 38 Since the Court has determined that Olson was within the course and scope of his employment at the time of the accident, the Court declines to reach the issue of whether the accident occurred on Olson's employer's premises.

Issue Four: Whether Petitioner is entitled to reasonable costs.

¶ 39 Since Olson is the prevailing party, he is entitled to his costs.[60]

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¶ 40 Petitioner was within the course and scope of his employment and, therefore, his claim is compensable.

¶ 41 Petitioner is entitled to reasonable costs.

¶ 42 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 3rd day of February, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Laurie Wallace
Kevin Braun
Submitted: December 10, 2013

[59] *Gordon*, 188 Mont. at 171, 612 P.2d at 671.

[60] § 39-71-611, MCA.