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Opinion No. 01-037

Employee Pension Funds Not Considered "Earnings" Under Workers' Compensation Act

QUESTION

Whether an employee's "pension and retirement savings" constitute part of the employee's earnings for purposes of determining the employee's appropriate benefit rate under the Workers' Compensation Act?

OPINION

No, fringe benefits such as employer contributions to an employee's pension or retirement savings plan are not considered earnings for purposes of computing an employee's rate of compensation under the Workers' Compensation Act.

ANALYSIS

Tenn. Code Ann. § 50-6-102(2)(D) (Repl. 1999) provides, "[w]herever allowances of any character made to any employee in lieu of wages are specified as part of the wage contract, they shall be deemed a part of such employees's earnings."

Under the Workers' Compensation Act ("Act"), as in any wage-basis calculation, the beginning point is the computation of actual earnings. An employee's earnings are used as the basis in arriving at that employee's "average weekly wage," which is used to compute the employee's rate of benefit compensation under the Act. *See* Tenn. Code Ann. § 50-6-102(2)(Repl. 1999); Tenn. Code Ann. § 50-6-207 (Supp. 2000). Generally, "actual earnings include not only wages and salary, but anything received as consideration for the work such as room and board, tips, bonuses, and commissions." *See* Op. Tenn. Atty. Gen. 94-011, *citing* 2 Larson, Workers Compensation Law, § 60.12(a). Tennessee courts have held that "average weekly wages" includes anything received under the terms of an employee's contract from which the employee realizes economic gain. *P & L Constr. v. Lankford, 559 S.W.2d 794 (1978); see also Moss v. Aluminum Co. Of America*, 152 Tenn. 249, 276 S.W. 1052 (1925) (bonuses paid as compensation for services are also included in computation of average weekly wages);

cf. Crane Co. v. Jamieson, 237 S.W.2d 546 (Tenn. 1957) (meals and tips not included in calculating "average weekly wages" because not considered part of the wage contract by either the employer or the employee.)

The specific question presented here is whether an employee's "pension and retirement savings" are considered earnings for the purpose of calculating the employee's average weekly wages. For purposes of this opinion, we assume the pension or retirement savings are funds contributed by the employer to the employee's pension or retirement savings plan.

The Tennessee Supreme Court has explicitly held that fringe benefits do not constitute employee earnings under the Act. *Pollard v. Knox Co.*, 886 S.W.2d 759 (Tenn. 1994). The issue in *Pollard* was whether an employer's contributions used to pay premiums for the employee's health insurance should be considered part of the employee's earnings under the Act. The court specifically considered Tenn. Code Ann. § 50-6-102(D) and the *P & L Constr. v. Lankford* decision, *supra*, pointing out that the statement in the *Lankford* decision that "earnings of an employee include anything received by him under the terms of his employment contract from which he realizes economic gain," was only dicta. *Pollard*, 886 S.W.2d at 760. In reaching its decision, the court discussed the Larson treatise, noting that the revised text contains "strong language on the subject [of fringe benefits]," pointing out that for over 70 years under workers' compensation law in the United States, an employee's benefit rate has always begun with "a wage basis calculation that made "wage" mean the "wages" that the worker lives on and not miscellaneous "values" that may or may not some day have a value to him depending on a number of uncontrollable contingencies . . .." *Pollard*, 886 S.W.2d at 760, *citing* 2 Larson, Workers' Compensation Law, § 60.12(b) (1993). The court also noted that "[w]hen the Workers' Compensation Act was passed in the year 1919, code section 50-6-102(D) contained precisely the same language it contains today," and that "the Legislature has never, in more than a dozen times in which it has amended the statute, changed the definition of wages to include fringe benefits. *Pollard* at 760, *citing with approval Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) (holding that employer contributions to union trust funds for health and welfare, pensions, and training are not "wages" for purposes of computing compensation benefits under Longshoremen's and Harbor Workers' Compensation Act.).

Accordingly, we are of the opinion that an employee's pension or retirement savings plan does not constitute earnings such that it may be included in the computation of the employee's average weekly wages under the Act.

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