COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 53696-98**

William Ning Ma	Employee
General Electric Co.	Employer
General Electric Co.	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Wilson and Carroll)

APPEARANCES
Patrick Gable, Esq., for the employee
Scott E. Richardson, Esq., for the self-insurer at hearing
Susan Saucier, Esq., for the Trust Fund at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

MAZE-ROTHSTEIN, J. The claimant appeals from a decision that awarded her G. L. c. 152, § 31, benefits for her husband's work-related death. The claimant contends that the judge miscalculated the average weekly wage at $ 484.99, by failing to account for employer-paid food, lodging and other travel expenses incurred during the employee's extensive travel as a corporate auditor. Because we agree with the ruling that these expenses constituted reimbursable business expenses that did not represent real economic gain for the employee, we affirm the decision.

William Ning Ma met an untimely end in a motor vehicle accident in Williamstown, Massachusetts on October 2, 1998, while in the course of his employment. (Dec. 2; Tr. I, 21.) Mr. Ma was a citizen of China, where he and his family lived. At the time of his death, he had been working in the United States for over a year in a training program for auditors and to increase his fluency in English. (Dec. 2; Employee Exhibit 4.) The only issue at the hearing was the calculation of his average weekly wage. The

judge reached his § 1(1)[1] wage by combining his base salary of $460.70 per week, inclusive of a $7,500.00 yearly stipend, with a "13-month bonus" of $1,262.87 annually. Employees from different countries were paid salaries consistent with the cost of living in their home countries. (Dec. 3.) The calculation totaled the $484.99 average weekly wage used to calculate the claimant's § 31 benefits. (Dec. 6.) Not included in the average weekly wage tally were considerable travel expenses, consisting of meals, dry-cleaning, groceries, hotel bills and regular flights home to China to visit his family. The travel expense allowances were the same for all employees travelling under similar circumstances. (Dec. 3.)

The claimant contends that in the travel expense omission lies the error. She theorizes that the employer actually provided room and board for Mr. Ma while he was outside of China. It is well established that the value of room and board provided in lieu of pay for services is rightly included in the calculation of average weekly wage. See Brewer's Case, 335 Mass. 601, 604 (1957); Palomba's Case, 9 Mass. App. Ct. 881 (1980)(rescript); Corbett v. The Druker Co., 14 Mass. Workers' Comp. Rep. 276 (2000). We acknowledge that the employee's circumstances – staying in employer-reimbursed apartments and hotels for extended periods of time, (Tr. I, 35), do smack of "room and board," as the claimant argues. However, the judge concluded that Mr. Ma had to produce receipts for travel reimbursement, that his time outside of China was nonetheless not open-ended,[2] and that the employee maintained his home in China, where his family lived. (Dec. 2- 4.) We cannot say that the findings are inaccurate or incorrect, and, as such, his conclusion as to the employee's average weekly wage logically follows.

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[1] General Laws c. 152, § 1(1), as amended by St. 1998, c. 161, §§ 533, 534, defines "average weekly wages" in relevant part as "the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two . . . ."

[2] The claimant correctly notes, (claimant br. 5), that the judge improperly factored in the duration of Mr. Ma's stay, as length of travel has nothing whatsoever to do with distinguishing between "pay" and "reimbursements." However, the error does nothing to the final result here and is, therefore, harmless. See LaPlante v. McGuire, 325 Mass. 96, 98 (1949); Bendett v. Bendett, 315 Mass. 59, 65-66 (1943).

The judge relied on the reviewing board decision in Bradley v. Commonwealth Gas Co., 11 Mass. Workers' Comp. Rep. 439 (1997), to reach his conclusion. In that case, we distinguished between reimbursements of expenses triggered by work conditions – which do not represent real economic gain to the employee – and allowances for meals or lodging provided consistently and regardless of actual use. The judge did include, in the employee's average weekly wage, the consistently paid stipend of $7,500.00 per year. However, based on Bradley, the judge found the travel expenses were reimbursed as a business expense. As we stated in Bradley:

> [E]mployment expenses paid because of work performed, *such as the reimbursement of travel expenses (mileage, hotel and meals)* or reimbursement of dinners purchased by salaried employees working late [are] [u]nlike an allowance which is paid consistently or board which is consistently provided, [as] these reimbursements seem to [be] due when triggered by work conditions, and supported by an expense voucher. Here the employer payment was limited by the amount the employee actually spent; it was a reimbursement of an out-of-pocket expense which could not exceed a fixed dollar amount. Such payment has historically been considered as reimbursement of a business expense, not resulting in net economic gain to an employee and thus not includible in the average weekly wage.

Bradley, supra at 441 (emphasis added). Likewise in the present case, the employee would have to produce receipts, and the employer would only reimburse the employee up to the maximum allowance for expenses, according to its internal guidelines. (Dec. 3; Tr. II, 45-46.) The conclusion that these were reimbursable business expenses not includible in the average weekly wage was not arbitrary, capricious or contrary to law. See G. L. c. 152, § 11C.

The claimant also argues that the employee's average weekly wage should have been determined in accordance with the clause in § 1(1) governing situations in which an employee's actual wages for the 52 weeks prior to injury or death are incapable of calculation:

> Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to

> the injury, was being earned by a person in the same grade employed at the same work by the same employer . . . .

The claimant, by resort to this provision, claims entitlement to a higher base wage for the employee's work performed outside of China. There is no basis for the claimant's contention, as the employee's actual wages for the twelve months prior to his death were quite readily available, and were properly used to calculate the employee's § 1(1) average weekly wage.

The decision is affirmed.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: March 6, 2002