CATHERINE O'BRIEN BERRY
(Appellee)

v.

SOUTHERN MAINE MEDICAL CENTER
(Appellant)

and

SYNERNET
(Insurer)

Argued: September 26, 2018
Decided: January 29, 2020

PANEL MEMBERS: Administrative Law Judges Collier, Elwin, and Jerome
BY: Administrative Law Judge Elwin

[¶1] Southern Maine Medical Center (SMMC) appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*), on remand from the Appellate Division, granting Ms. Berry's Petitions for Award and for Payment of Medical and Related Services, and ordering payment of benefits for her October 25, 2013, work injury. SMMC asserts that the ALJ erred in determining that amounts Ms. Berry received pursuant to SMMC's tuition reimbursement policy were fringe benefits to be included in Ms. Berry's average weekly wage, rather than payments for "special expenses" which should be excluded. Because we conclude that the ALJ correctly applied 39-A M.R.S.A. § 102(4)(F) (Supp. 2018) and Me. W.C.B. Rule, ch. 1, § 5(1), we affirm the decision.

I. BACKGROUND

[¶2] Ms. Berry worked for SMMC as a medical assistant. On October 25, 2013, she injured her right shoulder when she tripped and fell at work. Initially, the board issued a decree denying her petitions for award and for payment of medical and related services. Ms. Berry appealed, and the Appellate Division remanded the case for additional findings on the issue of work-relatedness. *O'Brien v. Southern Maine Medical Ctr.*, Me. W.C.B. No. 16-32, ¶ 8 (App. Div. 2016).

[¶3] On remand, the ALJ granted Ms. Berry's petitions and awarded benefits. The ALJ found that Ms. Berry's average weekly wage included, as a fringe benefit, $53.35 per week for tuition reimbursements paid by SMMC to Ms. Berry pursuant to SMMC's Educational Assistance Program. The tuition reimbursement program was voluntary.

[¶4] After the ALJ granted the petitions following remand, SMMC filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A § 318 (Supp. 2018), which the ALJ denied. SMMC appealed. The only issue on appeal is whether the ALJ erred when including the tuition reimbursements in Ms. Berry's average weekly wage as a fringe benefit.

II. DISCUSSION

[¶5] The role of the Appellate Division in reviewing questions of law "is limited to assuring . . . that [the] decision involved no misconception of applicable

law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A. 2d 156, 158 (Me. 1995) (quotation marks omitted).

[¶6] SMMC argues that the tuition reimbursement it provided to Ms. Berry should be excluded from the calculation of her average weekly wage because it is a "special expense" under 39-A M.R.S.A. § 102(4)(F). We disagree.

[¶7] As provided in the Act, "average weekly wages, earnings or salary" include "any fringe or other benefit paid by the employer that does not continue during the disability." 39-A M.R.S.A. § 102(4)(H) (Supp. 2018). Chapter 1, section 5 of the board's rules defines "fringe benefits" as "anything of value to an employee and dependents paid by the employer which is not included in the average weekly wage." Me. W.C.B. Rule, ch. 1, § 5(1). Section 102(4)(F) and Rule, ch. 1, § 5(1) both exclude from an employee's average weekly wage money provided by an employer to cover "special expenses," defined as expenses "incurred by the employee by the nature of the employee's employment." 39-A M.R.S.A. § 102(4)(F); Me. W.C.B. Rule, ch. 1, § 5(1).

[¶8] Me. W.C.B. Rule, ch. 1, § 5(1) provides a non-exhaustive list of fringe benefits:

> (1) For those who do not self-fund, the employer's cost to provide health, dental and disability insurance benefits less the employee's contribution;

(2) For those who self-fund disability, the employer's cost to provide disability benefits less the employee's contribution;

(3) The employer's cost to provide pension benefits, including 401(k), 403(b), or equivalent plan matching funds that cease being paid because the employee is not working. The employer's obligation to include 401(k), 403(b), or equivalent plan matching funds ends when the employee returns to work for the employer;

(4) The fair market value of employer-provided meals and/or housing;

(5) The employer's cost of providing utilities and other costs associated with the provision of housing; and [sic]

(6) The value of using a company vehicle for personal purposes; and

(7) The employer's cost to provide life insurance benefits less the employee's contribution.

The rule also provides that certain costs "shall not be considered a 'fringe or other benefit'":

(1) The cost of uniforms provided by the employer for use in the employment;

(2) Employer contribution to Social Security, unemployment insurance or workers' compensation insurance;

(3) A company vehicle for which the employee must reimburse the employer for personal use;

(4) Charitable contributions and/or matching gifts;

(5) Company sponsored picnics and other social activities; and

(6) Reimbursements for travel, parking, etc.

Id.

[¶9] The ALJ specifically addressed SMMC's assertion that tuition reimbursement is a special expense as follows:

> I do not find the employer's argument persuasive because this expense is not "[A] sum to cover any special expense incurred by the employee by the nature of the employee's employment…" The employee was not required to take the courses due to the nature of her employment. In fact, the tuition reimbursement policy states that involvement is voluntary and any courses are to be taken during non-work time. This expense was not incurred to keep the employee certified for her job as a medical assistant. There was nothing about the employee's job that necessitated this expense. It was a benefit offered of which she took advantage.

The ALJ found, and there was no dispute, that Ms. Berry was not required to take any courses due to the nature of her employment.

[¶10] SMMC further argues that the voluntary nature of the tuition reimbursement program does not discount it as a special expense. Instead, SMMC characterizes the language: "incurred by the nature of the employee's employment," as encompassing any expenses that are related to the employment. Because the tuition reimbursement policy explicitly requires that courses be related to employment, SMMC argues, her course expenses were necessarily incurred by the nature of Ms. Berry's employment.

[¶11] However, the "special expenses" identified in the board rule are typically expenses incurred only because of the employment, such as parking, travel and uniforms. Payments for these are not considered "fringe benefits" because the employee is being made whole for expenditures required by the employment. In

contrast, "fringe benefits" include payments to an employee that do not directly offset an expense required by the employment. Instead, fringe benefits are non-wage payments that form part of a compensation package. Benefits such as health insurance, pension plans, and personal use of a car, are all items of value to an employee but do not offset a specific expense required by the employment.

[¶12] In *Hackett v. Western Express, Inc.*, 2011 ME 71, 21 A.3d 1019, a case relied upon by SMMC, a truck driver was reimbursed for "lodging, meals, and telephone calls," which the Law Court concluded were special expenses because they "would be incurred by truck drivers due to the nature of their employment." *Id.* ¶ 9. Educational courses not required for certification or otherwise required by an employer are distinguishable; they are not incurred due to the nature of work as a medical assistant. Rather, the tuition reimbursements are more like fringe benefits than special expenses.

[¶13] Ms. Berry derived personal value from the courses and, as noted, the courses were not necessary or required in order for her to do her job. The condition that the courses be related to her employment is more reasonably viewed as a pragmatic limitation on SMMC's tuition reimbursement policy than an indicator that the courses were incurred due to the nature of her work.

[¶14] We find no error in the ALJ's conclusion that tuition reimbursement for a course that Ms. Berry was not required to take to maintain her position with

SMMC was a fringe benefit rather than reimbursement of a special expense, and was therefore properly included in her average weekly wage calculation.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2018).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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