

THE STATE



OF WYOMING

ED HERSCHLER  
GOVERNOR

*Attorney General*

CHEYENNE, WYOMING 82002

V. FRANK MENDICINO  
ATTORNEY GENERAL

October 7, 1977

OPINION NO. 77-27

TO: The Honorable James B. Griffith  
State Auditor

John T. Langdon  
Insurance Commissioner

BY: V. Frank Mendicino  
Attorney General

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QUESTION: Can a State officer or employee receive a per diem  
of \$45.00 per day for travel for out of state?

ANSWER: No.

FACTS

The 44th Legislature amended W.S. 9-13(a) so as to provide for an out of state travel expense in the amount of \$45.00 per day. While in-state travel expenses are reimbursed only for "actual and necessary expenses," it is not clear whether this phrase applies to out of state travel. This uncertainty has generated two diverse views as to the meaning of the statute. One theory is that out of state travel is to be reimbursed on the basis of a per diem of \$45.00 per day. Others advocate that out of state travel is to be reimbursed on the basis of "actual and necessary expenses for lodging and meals" not exceeding \$45.00 per day without prior approval of the governor.

W.S. 9-13(a) states:

When any state officer or employee is required to travel on business of the state he is entitled to receive in addition to actual transportation expenses

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reimbursement for actual and necessary expenses for lodging and meals not exceeding thirty-five dollars (\$35.00) per day for expenses for each calendar day while traveling within the state, and forty-five dollars (\$45.00) for expenses for each calendar day while traveling outside the state of Wyoming. With specific prior approval of the governor for the executive branch, the management council for the legislative branch or the chief justice of the supreme court for the judicial branch, actual expenses in excess of the above limit may be reimbursed for out of state travel.

Those who advocate a fixed per diem for out of state travel do so on the basis that the comma found between the word "state" and the word "and" in the aforementioned quotation serves to set that clause off from the prior language. Those who view out of state travel as a reimbursable item based upon actual and necessary expenses do so on the basis that 9-13(a), in reality, reads as follows:

When any state officer or employee is required to travel on business of the state he is entitled to receive in addition to actual transportation expenses reimbursement for actual and necessary expenses for lodging and meals not exceeding thirty-five dollars (\$35.00) per day for expenses for each calendar day while traveling within the state, and WHEN ANY STATE OFFICER OR EMPLOYEE IS REQUIRED TO TRAVEL ON BUSINESS OF THE STATE HE IS ENTITLED TO RECEIVE IN ADDITION TO ACTUAL TRANSPORTATION EXPENSES REIMBURSEMENT FOR ACTUAL AND NECESSARY EXPENSES FOR LODGING AND MEALS NOT EXCEEDING forty-five dollars (\$45.00) PER DAY for expenses for each calendar day while traveling outside the state of Wyoming.

It is this quandary which has called into question the travel expense statute and the correct interpretation to be placed upon it.

### DISCUSSION

A statute is not open to construction as a matter of course. Druley v. Houdesheldt, 75 Wyo. 155, 294 P.2d 351, rehear. den. 75 Wyo. 155, 296 P.2d 251 (1956). It is only when a statute is uncertain and susceptible of more than one meaning that courts have considered it ambiguous, Natrona County v. Casper Air Service, 536 P.2d 142 (Wyo. 1976), and allowed examination thereof to ascertain legislative intent. Where a statute is unambiguous and conveys a clear and definite meaning, the courts have refused to apply rules of statutory construction. Matter of Voss' Adoption, 550 P.2d 481 (Wyo. 1976); Wyoming State Treasurer v. City of Casper, 551 P.2d 687 (Wyo. 1976). The Wyoming Supreme Court has also indicated that when a statute is called into question because of an ambiguity, it can inquire of any source of information which can shed a clear and satisfactory answer to its inquiry, State ex rel. City of Cheyenne v. Swan, 7 Wyo. 166, 51 P. 209 (1897), including the legislative history of the Act. Town of Clearmont v. State Highway Commission, 357 P.2d 470 (Wyo. 1961). As Flora v. U.S., 80 S. Ct. 630, 362 U.S. 145, 4 L. Ed. 2d 623, rehear. den. 80 S. Ct. 953, 362 U.S. 972, 4 L. Ed. 2d 902 (1960), noted "...the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation...." While Wyoming does not have the exhaustive historical system for documenting legislative history that Congress does, it does have a source of information for guidance in the House and Senate Journals which record any amendments to Bills or Senate Files.

As introduced in the Wyoming House of Representatives, the language of W.S. 9-13(a), Original House Bill 160, 1977 Session, read as follows:

When any state officer or employee is required to travel on business of the state he is entitled to receive in addition to actual transportation expenses a ~~per-diem-expense-of-fourteen-dollars--and-fifty-cents-(\$14.50)-or-actual-expense-of~~ lodging, ~~---whichever-is-less,--and--ten-dollars--and--fifty--cents--(\$10.50)--for~~ meals THIRTY DOLLARS (\$30.00) PER DAY FOR EXPENSES FOR EACH CALENDAR DAY while traveling within the state OR ACTUAL

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EXPENSES WITH THE SPECIFIC APPROVAL OF THE GOVERNOR OR HIS DESIGNEE, and ~~a--per diem--expense--of~~ forty dollars (\$40.00) ~~per~~ FOR EXPENSES FOR EACH CALENDAR day while traveling without the state of Wyoming. With specific approval of the governor actual expenses may be reimbursed for out of state travel. FOR INSTATE OR OUT OF STATE TRAVEL OF LESS THAN A FULL DAY, ACTUAL EXPENSES SHALL BE PAID.

It should be noted that as the measure was originally introduced in the House, it made both in-state and out of state travel a per diem item, except where actual expenses were approved by the governor, even though it struck out the term "per diem." Had there been no subsequent amendments to Original House Bill 160 most travel would have been reimbursable on a per diem basis.

However, on January 25, 1977, Representative Donley introduced several major amendments to the original bill. Those amendments altered the bill so that it read in pertinent part as follows:

When any state officer or employee is required to travel on business of the state he is entitled to receive in addition to actual transportation expenses a ~~per-diem-expense-of-fourteen-dollars--and fifty-cents--(\$14.50)--or-actual-expense-of lodging--whichever---is--less,--and--ten dollars--and--fifty--cents--(\$10.50)--for meals~~ REIMBURSEMENT FOR ACTUAL AND NECESSARY EXPENSES FOR LODGING AND MEALS NOT EXCEEDING THIRTY-FIVE DOLLARS (\$35.00) PER DAY FOR EXPENSES FOR EACH CALENDAR DAY while traveling within the state, and ~~a-per-diem-expense--of--forty~~ FORTY-FIVE dollars ~~(\$40.00)~~ (\$45.00) FOR EXPENSES FOR EACH CALENDAR day while traveling ~~without~~ OUTSIDE the state of Wyoming. With specific PRIOR approval of the governor FOR THE EXECUTIVE BRANCH, THE MANAGEMENT COUNCIL FOR THE LEGISLATIVE BRANCH OR THE CHIEF JUSTICE OF THE SUPREME COURT FOR THE JUDICIAL BRANCH,

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actual expenses IN EXCESS OF THE ABOVE  
LIMIT may be reimbursed for out of state  
travel. (emphasis added).

It is obvious that Representative Donley's amendment introduced the concept of across the board actual and necessary expenses for the first time and eliminated the per diem concept. His amendment also authorized the heads of each branch of government to allow actual expenses in excess of a limit for out of state travel -- the limit being the \$45.00 set forth in the bill. We must conclude that the use of the word "limit" is a clear reflection of the intention of the legislature that out of state travel be reimbursed on an actual and necessary basis in the same manner as in state travel. A contrary construction would make the use of the word "limit" absurd and unnecessary.

We recognize the argument that if the legislature had intended for the entire first sentence of 9-13(a) to be composed of two subject matters limited by only one expostulation of conditions, a comma would not have been interposed between the clauses. However, that argument would require the conclusion that all of the conditions included in the first part of the sentence apply only to in state travel. If that were the case, it would be impossible to determine who could travel, when, why and under what conditions, and for what reasons persons could travel out of state on behalf of the State of Wyoming. Obviously, this is an absurd result which the legislature could not have intended. Therefore, all of the language in the first part of the sentence must apply equally to in state and out of state travel including that portion which requires reimbursement for actual and necessary expenses only.

Having concluded that as a general proposition state employees are to be reimbursed for actual and necessary expenses up to \$45.00 for out of state travel, we must now discuss the exception to that rule which is set forth in W.S. 26.1-38(a). That statute reads as follows:

The reasonable and proper expense of examination of an insurer, or of any person referred to in subsections (b) (management or control of an insurer under contract) or (d) (promoters, etc.) of section 26.1-33, shall be borne by the person examined. Such expense shall include the reasonable and proper expenses of the commissioner and his

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examiners, and a reasonable per diem as to such examiners, as necessarily incurred in the examination.

Obviously, this provision is a special statute relating to payment of the expenses of the Insurance Department under certain specified circumstances, and the reimbursement of such expenses to the State. It is a well established rule of statutory construction that general legislation must yield to special legislation on the same subject whether the provisions are found in the same statute or in different statutes, Higby v. State, 485 P.2d 380, 382 (Wyo. 1971), and that where a special act is inconsistent with general law, the provisions of the special act will control. Carpenter and Carpenter v. Kingham, 56 Wyo. 314, 109 P.2d 463; modified and rehear. den. 56 Wyo. 314, 110 P.2d 824 (1941).

Application of the provisions of W.S. 25.1-38(a) means that when employees of the Insurance Department are conducting examinations for which the insurer is responsible for the expenses thereof, the Department employees are entitled to receive a "reasonable per diem" instead of reimbursement for actual and necessary expenses. When employees of the Insurance Department travel for purposes not covered in W.S. 26.1-38(a) they should be reimbursed in accordance with the provisions of W.S. 9-13(a).

This conclusion is further supported by the fact that the legislature eliminated the concept of per diem when it amended W.S. 9-13(a), but it did not amend W.S. 26.1-38(a). If the legislature had wanted to change the method of reimbursement to Insurance Examiners, they would have amended W.S. 26.1-38(a). To those who understand the operation of the Insurance Department, the reason for the legislature's refusal to change W.S. 26.1-38(a) is obvious. Virtually all State employees who travel out of state go on very short trips and, therefore, the responsibility of keeping track of all actual expenses, while perhaps an inconvenience, is not overly burdensome. Insurance Examiners, on the other hand, are frequently out of state conducting examinations of insurance companies doing business in the state for weeks and sometimes months at a time. For these individuals, the requirement of keeping track of actual expenses would be very burdensome indeed.

Historically, the Insurance Commissioner has determined that the reasonable per diem provided for in W.S. 26.1-38(a) is the same as the maximum daily amount authorized for all State

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employees by the legislature. According to Sutherland on Statutory Construction (Vol. 2A p. 235, § 49.04), "Where there has been a long continued administrative interpretation of a statute which has two or more possible reasonable interpretations, the rulings of the administrative body should be controlling." For that reason we would recommend that the figure set forth in W.S. 9-13 as a maximum for out of state travel be established by the Insurance Commissioner as a reasonable per diem pursuant to W.S. 26.1-38(a).

CONCLUSION

A state officer or employee cannot receive a per diem of \$45.00 per day for out of state travel but must be reimbursed on the basis of actual and necessary expenses for lodging and meals not exceeding \$45.00 per day without prior approval, provided, however, that when the Insurance Commissioner or his examiners are performing those duties prescribed by W.S. 26.1-38, they may receive a per diem as determined by the Insurance Commissioner to be reasonable.

Respectfully submitted,

  
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