IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

LEO WICKHAM and STEPHANIE WICKHAM,	)	
	)	
Plaintiffs,	)	TC-MD 060465A
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE, State of Oregon,	)	
	)	
	)	
Defendant.	)	**DECISION**

Defendant adjusted Plaintiffs' 2002 Oregon personal income tax return, disallowing a deduction for away-from-home business travel expenses. Plaintiffs appealed and a telephone trial was held August 7, 2006. For ease of reference, Plaintiffs will be referred to collectively as Plaintiffs and individually as Leo and Stephanie.

I. STATEMENT OF FACTS

Plaintiffs live in La Grande, Oregon, in a home they purchased in 1999.[1] Plaintiffs have two children, born in 1994 and 1997, both of whom were attending school in La Grande in 2002. Leo was hired by the Union Pacific Railroad in April 2000 to work as an assistant signalman at the La Grande railyard. An assistant signalman is a training position that lasts between 18 months and two years and involves periodic two-week schooling sessions in Salt Lake City, Utah. At the end of the training period, the employee becomes a Signalman. Leo completed the training period and became a Signalman. At the time of trial, Leo was still

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[1] Unless otherwise noted, all facts were ascertained from testimony given at trial. No exhibits were submitted by either party.

working for the railroad. Stephanie was hired by the State of Oregon in December 1999 and works in or near La Grande. In 2002, Leo earned approximately two-thirds of the couple's combined income.[2]

The railroad has two types of positions: Signalman, a construction job in which employees generally work Monday through Friday from approximately 7 a.m. to 4 p.m., and Signal Maintainer, an on-call maintenance position that troubleshoots railway problems as they arise, day or night. The construction jobs are generally upgrade projects designed to improve operations at various railyards. According to Leo's testimony, the maintenance positions are more critical from an operational standpoint because the maintenance workers fix problems related to safety and day-to-day operations.

Leo testified generally that, at the start of an upgrade or other project, the railroad would post temporary job openings wherever they needed manpower. Temporary jobs were for less than six months in duration. If no one bid on those jobs, the railroad would "cut off" or "bump" positions in locations where fewer employees were needed so that those workers would have no choice but to take the temporary positions. The manager would give notice 15 days prior to cutting the employee's existing position to give them time to look for another position, and the manager would inform the employee of other temporary positions that were coming available. Leo specified that, if his job were cut off, he had to take one of the temporary jobs or he would lose his position with the railroad. The same was true with what Leo testified was called a "forced assignment," where an employee was moved to fill-in temporarily at a different location

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[2] According to Defendant, Plaintiffs' W-2 wage statements showed that Stephanie earned $26,867 in 2002 and Leo earned $52,222. Leo agreed with those numbers at trial.

due to a new project or to an unforseen event such as a medical emergency. Leo testified that, if he didn't take a forced assignment, he would lose his job.

Leo worked both construction and maintainer jobs for the railroad in 2002, changing positions and locations frequently as follows:

Location	Start Date (approx.)	End Date (approx.)	Job Type
Kent, Washington	October 2000	January 25, 2002	Construction (Signalman)
Troutdale, Oregon	January 28, 2002	March 1, 2002	Construction (Signalman)
Baker City, Oregon	March 4, 2002	March 29, 2002	Maintainer (Signal Maintainer)
Troutdale, Oregon	April 1, 2002	June 28, 2002	Construction (Signalman)
Kent, Washington	July 1, 2002	September 13, 2002	Maintainer (Signal Maintainer)
Hinkle, Oregon	September 16, 2002	continued into 2003	Maintainer (Signal Maintainer)

Leo stayed either with friends or family when he was working away from the family home in La Grande. According to the sworn testimony, he would always return home to La Grande to be with the family on weekends, and Stephanie never came to stay with Leo at any of the out-of-town job sites. Leo stayed in a co-worker's trailer at the job site the first time he worked in Kent, and with his wife's parents in Olympia the second time he worked in Kent. Leo stayed with his mother in Salem both times that he worked in Troutdale. Baker City and Hinkle are closer to home, and Leo returned home each night to live with his family in La Grande during those job assignments.

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On their 2002 tax return, Plaintiffs claimed business travel expense deductions for mileage and meals while Leo was away from home for work. Plaintiffs deducted the cost of all of Leo's meals while he worked in Kent, from October 2000 to January 2002, and for both Troutdale assignments. Plaintiffs deducted Leo's lunch costs when he worked in Kent the second time, from July to September 2002, as well as when he worked closer to home in Baker City and Hinkle. Plaintiffs claimed mileage deductions for all of the weekend trips home Leo made to La Grande and back from Kent and Salem, the daily round-trip mileage from Olympia to Kent and Salem to Troutdale, and the daily round-trip mileage from La Grande to Baker City and Hinkle.

The court takes judicial notice[3] of the number of weekends in 2002 during the period of Leo's employment in Kent and Troutdale, the assignments requiring overnight stay:

Location	**Starting Date**	**Ending Date**	**Number of Weekends**
Kent, Washington	January 1, 2002	January 25, 2002	3
Troutdale, Oregon	January 28, 2002	March 1, 2002	4
Troutdale, Oregon	April 1, 2002	June 28, 2002	12
Kent, Washington	July 1, 2002	September 13, 2002	10

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[3] Under the Oregon Evidence Code, judicial notice may be taken, "whether requested or not[,]" of facts "not subject to reasonable dispute [and] * * * [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(c)(d), 201(b).

The court also takes judicial notice[4] of the following approximated distances (in miles) between locations relevant to this appeal:

Starting Location	**Ending Location**	**Approximate Mileage (one way)**
La Grande, Oregon	Kent, Washington	340 miles
Olympia, Washington	Kent, Washington	45 miles
La Grande, Oregon	Troutdale, Oregon	243 miles
Salem, Oregon	Troutdale, Oregon	62 miles
La Grande, Oregon	Baker City, Oregon	45 miles
La Grande, Oregon	Hinkle, Oregon	78 miles

Defendant issued a Notice of Deficiency October 31, 2005, denying Plaintiffs' claimed business-related travel expenses. (Def's Answer at 1.) Plaintiffs filed a written objection and, after considering Plaintiffs' position, Defendant denied their objection and issued a Notice of Assessment February 7, 2006, upholding its deficiency. (*Id.*) Plaintiffs now appeal that assessment.

II. ANALYSIS

A. *Legal Framework*

The court is guided by the intent of the legislature to make Oregon's personal income tax law identical in effect to the federal Internal Revenue Code (IRC) for the purpose of determining

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[4] Source: Rand McNally mileage calculator at www.randmcnally.com and Google Maps at www.google.com/maps.

taxable income of individuals. *See* ORS 316.007.[5] The legal authority for the disputed deductions begins in IRC section 162(a), which provides in relevant part:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –
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> "* * * * *
>
> "(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business[.]"

For a deduction to be allowed as a business expense, it must be both ordinary and necessary to a taxpayer's trade or business. IRC § 162(a)(2). To be " 'necessary[,]' an expense must be 'appropriate and helpful' to the taxpayer's business. * * * To be 'ordinary[,]' the transaction which gives rise to the expense must be of a common or frequent occurrence in the type of business involved." *Boyd v. Commissioner*, 83 TCM (CCH) 1253, 2002 WL 236685 at * 2 (US Tax Ct) (*Boyd*) (internal citations omitted). The Oregon Tax Court has stated that "* * * an ordinary expense is one which is customary or usual. This does not mean customary or usual within the taxpayer's experience but rather in the experience of a particular trade, industry or community." *Roelli v. Dept. of Rev.*, 10 OTR 256, 258 (1986) (*Roelli*) (citing *Welch v. Helvering*, 290 US 111, 54 S Ct 8, 78 L Ed 212 (1933)); *Guinn v. Dept. of Rev.*, TC-MD No 040472D, 2005 WL 1089727 at * 4 (Apr 19, 2005) (citing *Roelli*, 10 OTR at 258).

In contrast to the deductibility of ordinary and necessary business expenses under IRC section 162(a), IRC section 262(a) disallows deductions for "personal, living, or family

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[5] All references to the Oregon Revised Statutes (ORS) are to 2001.

expenses[.]" This court has recognized that "[t]he purpose of IRC § 162(a)(2) is to ameliorate the effects of business which requires taxpayers to duplicate personal living expenses," and that "[c]onsequently, courts must decide whether the claimed expense is actually required by the business rather than by the taxpayer's personal choice." *Harding v. Dept. of Rev.*, 13 OTR 454, 458 (1996) (*Harding*). In making this determination, the court "must consider why a taxpayer's abode is not near the taxpayer's place of business." *Id.*

1. *Expenses incurred while away from home*

Entitlement to the travel expense deduction under IRC section 162(a)(2) requires that the expenses "(1) were incurred in connection with a trade or business; (2) were incurred while away from home; and (3) were reasonable and necessary." *Morey v. Dept. of Rev.*, 18 OTR 76, 80-81 (2004) (*Morey*), (citing *Finn v. Dept. of Rev.*, 10 OTR 393, 395 (1987)); *see also Commissioner v. Flowers*, 326 US 465, 470, 66 S Ct 250, 90 L Ed 203 (1946) (*Flowers*). The central issue here is whether any of Leo's expenses were incurred "while away from home."

To be considered "away" from home within the meaning of IRC section 162(a)(2), a taxpayer must be on a trip requiring rest or sleep. *See United States v. Correll*, 389 US 299, 302, 88 S Ct 445, 19 L Ed 2d 573 (1967) (*Correll*); *see Sanders v. Commissioner*, 439 F2d 296, 298 (9th Cir 1971) (*Sanders*). This avoids a case-by-case analysis of whether a taxpayer was away from home on a particular day. *See Correll*, 389 US at 302.

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This court has laid out the following rules for determining a taxpayer's home in this context:

> "In general, a taxpayer's home for the purposes of section 162(a)(2) – *i.e.*, the taxpayer's '*tax home*' – is the taxpayer's principal place of business or employment. *Harding v. Dept. of Rev.*, 13 OTR 454, 459 (1996) (citing Rev Rul 83-82, 1983-1 CB 45). That general rule, however, is subject to an exception: the taxpayer's personal residence is the individual's *tax home* if the principal place of business is 'temporary' as opposed to 'indefinite' or 'indeterminate.' *Peurifoy v. Commissioner*, 358 US 59, 60 (1958). That exception is in turn subject to an exception found in the flush language of section 162(a), which provides that any employment period in excess of one year is *per se* indefinite." (Emphasis in original.)

Morey, 18 OTR at 81. Therefore, to be deductible under IRC section 162(a)(2), travel expenses, including lodging and meals, must be incurred while the taxpayer is working away from the taxpayer's tax home, which, in turn, is either the taxpayer's principal place of business or his personal residence, depending on the circumstances.

Case law articulates both subjective and objective legal standards that may be applied in determining the location of a taxpayer's tax home. Three different approaches are discussed in the *Morey* decision, although the court in that case did not address which legal standard controlled, having found that taxpayers failed to meet their burden of proof under any of the three standards. *Id*. at 82-86.

The subjective approach, or "reasonable probability" standard, requires a taxpayer to present some evidence from which the court may determine whether a reasonable probability was known to the taxpayer that they would be employed only for a short time at a given location, such as their actions, the type of job, and the employer's expectations. *Id*. at 82-83. The subjective standard is apparently preferred in the Ninth Circuit. *Id*. at 85.

There are two different objective approaches. The more formulaic "three part objective standard" considers (1) the length of time spent at each location; (2) the degree of business

activity at each location; and (3) the relative proportion of income derived from each location. *Id*. at 84-85. The "objective foreseeability" approach asks whether the taxpayer should have foreseen that the length of employment at a given location. *Id*. at 85-86 (citing *Ellwein v. United States*, 778 F2d 506, 510 (8th Cir 1985).

The parties in this case have not articulated a standard. The court will look at the facts and circumstances presented in determining whether, under either a subjective or objective approach, taxpayers have met their burden of proving by a preponderance of the evidence that Leo's travel expenses are deductible as filed. *See* ORS 305.427.

2. *Commuting Expenses*

Daily commuting expenses, unlike business traveling expenses, are generally not deductible under IRC section 162(a)(2) because they do not meet the sleep or rest requirement; they are considered "personal, living, or family expenses" under IRC section 262(a) rather than business expenses. *See Correll*, 389 US at 302-03; *see Sanders*, 439 F2d at 297-98. Expenses for traveling between home and place of business, *i.e.* commuting expenses, are not considered to be required by business, and are therefore nondeductible personal expenses under IRC section 162(a)(2), because "* * * where a taxpayer chooses to live is a personal decision." *Harding*, 13 OTR at 458; *see Flowers*, 326 US at 473; *see* Treas Reg § 1.162-2(e) (1960) ("[c]ommuters' fares are not considered as business expenses and are not deductible"). Commuting expenses on daily trips are deductible, if at all, under IRC section 162(a) as "ordinary and necessary" business expenses. *Sanders*, 439 F2d at 298. These are typically the expenses associated with getting from one work location to another on the same day. *See* Rev. Rul. 55-109, 1955-1 CB 261, *modified by* Rev. Rul. 90-23, 1990-1 CB 28.

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3. *Substantiation Requirements*

Under IRC section 274(d), deductions for mileage and meal expenses are disallowed unless substantiated by adequate records or by sufficient evidence corroborating the taxpayer's own statement. Even if an expense is otherwise deductible, the deduction may be denied if the substantiation to support the expense is insufficient. *See* Temp Treas Reg § 1.274-5T(a)(4) (as amended in 2003).[6]

a. Mileage

For use of an automobile, the taxpayer must substantiate the following elements: (i) the amount of the business use (a ratio of business use to total use of the automobile for a period of time), (ii) the date of the use, and (iii) the business purpose of the use. Temp Treas Reg § 1.274-5T(b)(6). The adequate records requirement may be satisfied by documentary evidence in combination with trip sheets, logs, a diary, or other records prepared at or near the time of the use. Temp Treas Reg § 1.274-5T(c)(2). Although a contemporaneous log is not required, "corroborative evidence * * * must have a high degree of probative value to elevate such statement and evidence to the level of credibility [of a contemporaneous record]." Temp Treas Reg § 1.274-5T(c)(1) (as amended in 2003); *see Daiz v. Commissioner*, 84 TCM (CCH) 148, 2002 WL 1796832 at * 8 (US Tax Ct 2002).

The regulations do provide that "the level of detail required in an adequate record to substantiate business[] use may vary depending upon the facts and circumstances," and that if a

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[6] Temporary Treasury Regulation section 1.274-5T(a)(4) (as amended in 2003) requires substantiation pursuant to paragraph (c) of that section for expenses incurred while traveling away from home, and notes that the "limitation supersedes the doctrine founded in *Cohan v. Commissioner*, 39 F2d 540 (2d Cir 1930)[,]" which allowed for the court to make a close approximation of the expenses where evidence indicated the expenses were incurred. Paragraph (c), in turn, contains the requirement of adequate records.

taxpayer's use of property follows a regular pattern, less recorded information may be required than if the use were sporadic. Temp Treas Reg § 1.274-5T(c)(2)(ii)(B)-(C).

b. Meals

Meal expenses also must be substantiated by adequate records or by sufficient evidence corroborating the taxpayer's own statement. IRC § 274(d). Because of the personal nature of meal expenses, without substantiation of the amount of the expense, the time and place, and the business purpose, deductions cannot be allowed. *See* IRC § 274(d); *Harding*, 13 OTR at 461 (citing Treas Reg 1.274-5T(c) (1989). In *Harding*, taxpayer's meal expense records consisted of "receipts showing a date, amount, receipt number, and a hand-written name or two," but, in many instances. did not show the name of the restaurant, and none of the receipts stated a business purpose. *Harding*, 13 OTR at 461. The records were held insufficient to substantiate the claimed expenses. *Id.*

B. *Application*

1. *Daily Commuting Expenses*

Commuting expenses for daily trips are only deductible if they are both ordinary and necessary for the taxpayer's trade or business. IRC § 162(a); *Sanders*, 439 F2d at 298. In distinguishing ordinary and necessary travel expenses from personal travel expenses, the court must consider whether a taxpayer who does not live near his or her place of employment does so because of personal choice or business requirement. *See Harding*, 13 OTR at 458. Here, Leo's choice of where to live was a personal decision; therefore, his expenses for traveling between where he was living and where he was working are personal and nondeductible under I C 162(a)(2). *Id.*; *see Flowers*, 326 US at 473; *see* Treas Reg § 1.162-2(e) (1960).

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Leo chose to live with his mother in Salem while working in Troutdale, a distance of 62 miles; he chose to live with his in-laws in Olympia while working in Kent, a distance of 45 miles; he chose to live with his family in La Grande while working in Baker City and Hinkle, distances of 45 and 78 miles, respectively. That milage is not deductible as an ordinary and necessary business expense because it was not appropriate or helpful to Leo's employment to live in Olympia, Salem, or La Grande, nor is there any evidence that that was customary or usual in the industry. IRC § 162(a); *see Boyd*, 2002 WL 236685 at * 2; *see Roelli*, 10 OTR at 258. Rather, living in Olympia, Salem, and La Grande was Leo's personal choice, and personal mileage expenses are not deductible. IRC § 262(a).

With respect to the jobs in Kent and Troutdale, although Leo may not reasonably have been expected to move his family to those locations, he could have chosen to move himself to those communities rather than to Olympia and Salem. Leo testified that he stayed with friends and family to save money. By making that personal choice, Leo saved on living expenses but incurred increased commuting costs that are nondeductible personal expenses. *Id*. With respect to his expenses for commuting from La Grande to Baker City and Hinkle, there is no way to distinguish those expenses from those of the average commuter who lives in one city but works in another, and whose daily mileage between the two is considered a commuting expense rather than a deductible business travel expense. *See* IRC §§ 162(a)(2), 262(a); *see* Treas Reg § 1.162-2(e) (1960).

2. *Other Travel (Mileage) and Meal Expenses*

Leo had no lodging expenses because he stayed with family and friends when he worked far from home. He claimed expenses for vehicle travel (mileage) and meals. Whether Plaintiffs are entitled to a deduction for mileage and meal expenses Leo incurred in returning to La Grande

on weekends while working in Kent and Troutdale is a matter of (1) whether he was working "away from home," and if so, (2) whether he has sufficiently substantiated his expenses. *See Morey*, 18 OTR at 80-81 (citation omitted); IRC § 274(d).

Defendant's position is that Plaintiffs' deductions are not allowable because Leo was not working away from home. Specifically, Defendant argued at trial that Leo chose to take those temporary jobs to avoid being laid off. Defendant reasoned that, because Leo's principal place of business and therefore his tax home changed with each job assignment, he was never working away from his tax home and none of his travel expenses are deductible.

However, a taxpayer's tax home is his or her principal place of business or employment *unless* that place of business is temporary. *See Morey*, 18 OTR at 81 (citation omitted). Therefore, whether Leo's jobs with the railroad were temporary, as opposed to indefinite, is critical to determining the location of Leo's tax home for each of the time periods in question. *Id*.

a. Kent, Washington: October 2000 to January 25, 2002

Leo's first job in Kent began in October 2000 and ended approximately 15 months later, in late January 2002 (although the court is ultimately only concerned with the deductibility of expenses incurred in the year at issue – 2002). Leo stayed in a co-worker's travel trailer at the job site in Kent, and he did not pay any rent to the co-worker. Leo deducted expenses for his meals and the mileage associated with traveling home to La Grande on weekends. That job falls under the exception that makes employment longer than one year *per se* indefinite: specifically, the flush language of IRC section 162(a) provides "[f]or purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home for any period of employment if such period exceeds 1 year." *See Morey*, 18 OTR at 81. This precludes an examination under either the subjective or objective standards of the temporariness of the position because Leo's

employment for that period is *per se* indefinite. *Id.*; IRC § 162(a). Therefore, Leo's tax home was his place of business in Kent, and his expenses for meals and for traveling between La Grande and Kent for the period from January 1, 2002 to January 25, 2002, cannot be deducted because he was not working away from home under IRC section 162(a)(2).

The rationale for disallowing a deduction for those expenses is that "an employee is considered to maintain a residence at or in the vicinity of that employee's principal place of business," Rev. Rul. 75-432, 1975-2 CB 60 (citation omitted), which in this case was Kent. Unlike a temporary transfer, where an employee is not expected to move to the new area, and may deduct his expenses because he is in a travel status, "an employee who is permanently transferred to a new area is considered to have shifted the home to the new post, which is the employee's new tax home. * * * The maintenance of the old residence where the taxpayer's family resides, and the taxpayer's travel back and forth, are strictly personal expenses that, under the provisions of section 262, are not deductible." *Id.* (citing *Commissioner v. Mooneyhan*, 404 F2d 522 (6th Cir 1968), *cert den*, 394 US 1001, and *Flowers*, 326 US 465).

b. Troutdale, Oregon: January 28, 2002 to March 1, 2002

Leo was then transferred from Kent to Troutdale by his manager, who called him at home on a Saturday and told him that he needed to report to Troutdale the following Monday morning at 7 a.m. When Leo moved to the job in Troutdale, he stayed at his mother's house in Salem, 62 miles away from Troutdale. Leo had no lodging expenses but deducted the cost of all of his meals and his weekend mileage from Salem to La Grande. Leo testified that that transfer was a "forced assignment" and that he was moved because there was a large project underway upgrading the signal system through the railroad's Brooklyn Yard, a project that the railroad estimated would take six months. That suggests the position was expected to be temporary both

objectively and subjectively – Leo expected the position to be temporary because the project was of a pre-determined length and the railroad had a common practice of forcing employees to switch locations temporarily to increase manpower for different projects. *See Morey*, 18 OTR at 82-86 (citations omitted). The court concludes that was a temporary position, therefore Leo's tax home was his personal residence in La Grande. *See Morey*, 18 OTR at 81 (citation omitted). Leo's work in Troutdale took him away from his tax home.

Leo's weekend trips home to La Grande were both ordinary and necessary under IRC section 162(a)(2). It was appropriate for him to have returned home to be with Stephanie and their children, and, given the railroad industry's frequent need to shift employees temporarily from location to location based on the need for manpower at different job sites, such trips may be considered common and customary in that type of business. *See Boyd*, 2002 WL 236685 at * 2; *see Roelli*, 10 OTR at 258 (citation omitted).

Because Leo was working temporarily in Troutdale and, therefore, away from his tax home in La Grande, he is entitled to deduct his expenses for weekend trips home to La Grande under IRC section 162(a)(2), subject to the substantiation requirements of IRC section 274(d). He may not, however, deduct the full mileage between Salem and La Grande because staying with his mother in Salem was his personal choice, and living in Salem put Leo 62 miles farther away from his home in La Grande. *See Harding*, 13 OTR at 458. He was not required by his employment to reside in Salem, nor was the mileage between Salem and Troutdale ordinary and necessary for his employment. *Id*.; IRC § 162(a). Rather, he is only entitled to deduct the mileage that was ordinary and necessary for his employment: from his place of employment in Troutdale to his tax home in La Grande. IRC § 162(a). His expenses for travel between Salem and Troutdale are personal and nondeductible under IRC section 262(a).

With regard to substantiation, Leo testified that he always returned to La Grande to be with his family on weekends, that his children were in school in La Grande at the time, and that Stephanie never came to stay with him at any of the job sites. Leo's expenses for weekend travel between Troutdale and La Grande, while not substantiated with a formal mileage log, follow a regular pattern and, therefore, a lesser level of detail is required under the regulations. *See* Temp Treas Reg §§ 1.274-5T(c)(2)(ii)(B)-(C) (as amended in 2003). The court has taken judicial notice of the mileage between Troutdale and La Grande: approximately 243 miles each way or 486 miles round-trip. The court has also taken judicial notice of the number of weekends that fell during that period: a total of 4. Taking Leo's testimony in conjunction with the facts and circumstances, the court acknowledges that Leo made regular weekend trips during that period and concludes that Plaintiffs can claim 1,944 miles[7] as a business travel expense under IRC section 162(a)(2).

With regard to meal expenses, Plaintiffs submitted no evidence to substantiate the amount Leo spent on meals. The court has no way of knowing whether Leo had any meal expenses. IRC section 274(d) requires evidence showing at least the amount, time, and place of the expenses, or no deduction is allowed even though the expenses may be otherwise deductible under IRC section 162(a)(2). *See Harding*, 13 OTR at 461 (citation omitted). Given the overwhelming lack of substantiation for the meal expenses incurred, that deduction cannot be allowed. *Id*.

c. Baker City, Oregon: March 4, 2002 to March 29, 2002

Leo successfully bid on a job in Baker City and left the job in Troutdale to work closer to home. He testified that the Baker City job became available because another worker

[7] 486 miles X 4 trips = 1,944 miles.

sustained a back injury and he was needed to fill in while that worker had surgery. The position was posted as "temporary pending return" of the employee who was out due to medical reasons. Leo's subjective expectation was, therefore, that the position would be temporary. Combined with the objective fact that it was posted as temporary, the court concludes that it was a temporary position and that Leo's tax home during that period was his personal residence rather than his place of employment. *See Morey*, 18 OTR at 81 (citation omitted). Leo testified that he began working in Baker City on March 4, 2002, and was "bumped" after about four weeks by another worker with more seniority. Leo deducted his lunch expenses and mileage for his daily trips between La Grande and Baker City. However, as discussed above, Leo's daily trips to Baker City did not require sleep or rest, therefore he was not "away" from home. *See Correll*, 389 US at 302; IRC § 162(a)(2). His meal and mileage expenses during that period are nondeductible personal expenses under IRC section 262(a).

d. Troutdale, Oregon: April 1, 2002 to June 28, 2002

After being bumped from the Baker City job, Leo accepted a temporary position in Troutdale, which he testified was the only available position at the time. He again stayed with his mother in Salem, returned to La Grande on weekends, and claimed deductions for all of his meal expenses and weekend mileage between Salem and La Grande. The job in Troutdale was advertised as a temporary job, making it both objectively and subjectively temporary, and Leo's tax home during that period was, therefore, his personal residence in La Grande. *See Morey*, 18 OTR at 81-86 (citations omitted). That position lasted approximately three months (April 1 through June 28, 2002). Leo's weekend trips home to La Grande to see his family were both ordinary and necessary, just as they were when he was working in Troutdale from January 28 to March 1, 2002. IRC § 162(a)(2).

Because Leo's position in Troutdale was temporary, he was working away from his tax home in La Grande and may deduct his expenses for weekend trips home to La Grande under IRC section 162(a)(2), subject to the substantiation requirements of IRC section 274(d). Just as the full milage between Salem and La Grande was not deductible when he previously worked in Troutdale and stayed with his mother in Salem, it is not deductible for that period of time either because living in Salem was his personal choice. IRC § 162(a); *see Harding*, 13 OTR at 458. Leo may only deduct the milage that was ordinary and necessary for his employment: from his place of employment in Troutdale to his tax home in La Grande. IRC § 162(a). His expenses for travel between Salem and Troutdale are personal and nondeductible under IRC section 262(a).

The court has taken judicial notice of the mileage between Troutdale and La Grande: approximately 243 miles each way or 486 miles round-trip. The court has also taken judicial notice of the number of weekends that fell during that period: a total of 12. Having already determined that Leo's expenses for weekend travel between Troutdale and La Grande, while not substantiated with a formal mileage log, follow a regular pattern and therefore a lesser level of detail is required under the regulations, the court acknowledges that Leo made regular weekend trips during that period and concludes that Plaintiffs can claim 5,832 miles[8] as a business travel expense under IRC section 162(a)(2).

As discussed above, Plaintiffs submitted no evidence to substantiate the amount Leo spent on meals, therefore that deduction is not allowed. Although meal expenses may be otherwise deductible under IRC section 162(a)(2), without some evidence showing at least the amount, time, and place of the expenses, no deduction is allowed under IRC section 274(d). *See Harding*, 13 OTR at 461 (citation omitted).

[8] 486 miles X 12 trips = 5,832 miles.

e. Kent, Washington: July 1, 2002 to September 13, 2002

Leo then took a position in Kent that was posted as "temporary pending return." He testified that it came open because an employee there had a heart attack. He began working in Kent on July 1, 2002. Leo testified that he was "force assigned" to that job while it was determined whether the original employee would be returning to work. This time he stayed with his wife's parents in Olympia, commuting approximately 45 miles to the job in Kent each day and returning to La Grande on weekends. During that period, Leo's weekend trips to La Grande were again both ordinary and necessary under the circumstances and in the railroad industry: this position became vacant because of a medical emergency, making Leo's presence in Kent appropriate and helpful to his business; and, as Leo testified, maintenance jobs such as that signal maintainer position, are critical to the day-to-day operations and safety of the railroad, which makes the filling of vacant maintenance positions customary in the railroad industry. *See Boyd*, 2002 WL 236685 at * 2; *see Roelli*, 10 OTR at 258 (citation omitted). That position was presented to Leo as temporary, and he expected it to be temporary. Therefore, the position was temporary from both an objective and a subjective standpoint, making Leo's personal residence in La Grande his tax home during that period. *See Morey*, 18 OTR at 81-86 (citations omitted). Thus, because he was "away from home" while working in Kent, his traveling expenses are deductible, subject to sufficient substantiation. IRC §§ 162(a)(2), 274(d).

For the traveling expenses, Leo is entitled to a deduction for the mileage between his place of employment in Kent, and his tax home in La Grande because he was required by his employment to be in Kent and travel from there to La Grande and back on weekends was ordinary and necessary, just as it was when he was working in Troutdale. *See* IRC § 162(a)(2).

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As noted above, Plaintiffs did not submit a mileage log to substantiate Leo's mileage expenses. However, as was true with the Troutdale-to-La Grande mileage, Leo's travel followed a regular pattern and his testimony regarding the regularity of his weekend trips applies to this time period as well. Leo's weekend trips follow a regular pattern, therefore a lesser level of detail is required under the regulations to meet the substantiation requirements of IRC section 274(d). *See* Temp Treas Reg §§ 1.274-5T(c)(2)(ii)(B)-(C) (as amended in 2003). The court has taken judicial notice of the mileage between Kent and La Grande, 340 miles each way or 680 miles round-trip. The court has also taken judicial notice that 10 weekends fell during that period. Given Leo's testimony and the facts and circumstances, the court acknowledges that Leo made regular weekend trips during that period and concludes that Plaintiffs can claim 6,800 miles[9] as a business travel expense under IRC section 162(a)(2).

Leo's meal expense deductions for that period are denied because Plaintiffs submitted no substantiating evidence. Without some evidence showing at least the amount, time, and place of the meal expenses, no deduction is allowed under IRC section 274(d), although the expenses may be otherwise deductible under IRC section 162(a)(2). *See Harding*, 13 OTR at 461 (citation omitted).

f. Hinkle, Oregon: September 16, 2002 to December 31, 2002

After about two and one-half months working in Kent, Leo successfully bid on an open position in Hinkle and was allowed to leave the position in Washington to work closer to his family. Leo began working in Hinkle on September 16, 2002. He testified that the job, which was posted as temporary, came open because the railroad was having problems maintaining the signal systems at the Hinkle yard and additional manpower was needed to assist

[9] 680 miles X 10 trips = 6,800 miles.

with the problem. The reason that position became available, together with the fact that it was posted as temporary, provides both a subjective and objective basis for determining that it was a temporary position. *See Morey*, 18 OTR at 82-86 (citations omitted). Therefore, Leo's tax home was his personal residence in La Grande. *Id*. at 81 (citation omitted). As discussed above, however, Leo was not "away from home" on trips requiring sleep or rest while working in Hinkle, therefore his lunch and mileage expenses are nondeductible personal expenses under IRC section 262(a). *See* IRC § 162(a); *see Correll*, 289 US at 302-03; *see Sanders*, 439 F2d at 297-98.

III. CONCLUSION

Under IRC section 162(a)(2), Plaintiffs are allowed a business expense deduction for the ordinary and necessary miles Leo traveled when his tax home was his personal residence in La Grande, Oregon, and he was working temporarily away from his tax home, pursuant to the court's decision as set forth above. Plaintiffs' request for meal expense deductions is denied under IRC section 274(d) due to a lack of substantiation. Finally, Plaintiffs' daily travel expense deduction for travel between Salem and Troutdale, Olympia and Kent, La Grande and Baker City, and La Grande and Hinkle, is denied under IRC section 262(a) as a nondeductible commuting expense. Now, therefore,

IT IS THE DECISION OF THIS COURT that Leo's tax home was Kent, Washington, from January 1, 2002, to January 25, 2002, and was his personal residence in La Grande, Oregon, from January 28, 2002 to December 31, 2002;

IT IS FURTHER DECIDED that, for tax year 2002, Plaintiffs are allowed a Schedule A business expense deduction for 14,576 miles of weekend travel between Leo's tax home and his temporary work assignments, as set forth in the court's above analysis;

IT IS FURTHER DECIDED that, for tax year 2002, Plaintiffs' claim for the Schedule A meal expense deductions is denied due to lack of substantiation, as set forth in the court's above analysis; and

IT IS FURTHER DECIDED that, for tax year 2002, Plaintiffs' claim for daily commuting expense deductions is denied under IRC section 262(a), as set forth in the court's above analysis.

Dated this _____ day of January 2007.

_____
DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by <u>mailing</u> to: 1163 State Street, Salem, OR 97301-2563; or by <u>hand delivery</u> to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within <u>60</u> days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson on January 30, 2007. The Court filed and entered this document on January 30, 2007.