APPEAL NO. 92513

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was originally held on April 9, 1992, in (city), Texas before (hearing officer). This panel reversed and remanded the decision of the hearing officer for further development of the issue of whether and to what extent (employer) truck payments to claimant represented actual reimbursement for the use of claimant's truck and not wages. *See* Texas Workers' Compensation Commission Appeal No. 92197, decided July 3, 1992.

Following a July 29, 1992 hearing on remand, the hearing officer concluded that the net truck payment paid to claimant under the equipment lease agreement was payment for use of claimant's truck and not wages; therefore claimant's AWW should be based on the gross amount of the driver payments paid to a similar employee in the thirteen week period immediately preceding claimant's (date of injury) injury.

In its request for review, the claimant argues that he was an employee of (''employer''), and contends that because he was paying workers' compensation premiums based on the truck portion of his payment, his AWW should be based on both the driver and the truck portions. No response was filed by the respondent, employer's workers' compensation insurance carrier (''carrier'').

DECISION

We affirm the decision and order of the hearing officer.

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Claimant had been working as a delivery man for employer from June 11, 1991, to (date of injury), the date of his injury. Pursuant to an equipment lease agreement, he was paid 63% of the total delivery charge for each haul, in two separate payments: a 43% truck check and a 20% driver check. (Claimant testified in the earlier hearing that title to the truck was in his father-in-law's name, but that he made payments on the truck and furnished the truck to the employer as part of the agreement, with all wages assigned to himself.) Because claimant had not worked for employer for 13 consecutive weeks prior to the date of his injury, carrier submitted a wage statement for a similar employee of employer, (Mr. M). The wages in the wage statement were based only on the driver's portion of Mr. M's payment, and not the truck portion. Carrier's position was that pursuant to the equipment lease agreement executed by claimant and employer, the truck payment constituted payment for the use of claimant's truck and not wages.

The lease agreement was made part of the record on remand. It was executed by the truck's owner and claimant's father-in-law, (Mr. J) (lessor), who in turn assigned all revenues from the truck to claimant through a power of attorney which was part of the agreement. Among other things, the lease agreement provided that lessor leased his truck to employer; that employer, as lessee, was to have exclusive possession, control, and use of the truck while it was operated in the services of employer; that the lessor was responsible for all operating costs of the truck, as follows: "fuel and fuel taxes, tolls, & ferry charges (sic), loading charges, scale tickets, permits, licenses, maintenance costs, lubricants, tires, insurance premiums (except as may be otherwise provided herein), fees and any and all fines and penalties arising out of the use of the subject equipment, except those fines and penalties which are the direct result of an act or omission of Lessee."

The lease agreement also contained the following provisions:

In consideration for the provision of the equipment which is the subject hereof, Lessee agrees to pay Lessor a percentage of the gross revenue derived by Lessee from use of the involved equipment in its transportation, operations, (sic) as set forth and described in Appendix "A," incorporated herein for all purposes . . . .

For furnishing his vehicle the lessor shall receive 43% of the freight bills billed by the Lessee to the customers serviced by the vehicle. Said payments shall be considered rental payments . . . For furnishing his personal services the Lessor shall receive 20% of the freight bills billed by the Lessee to the customers serviced by the Lessor. Said payments shall be considered commission and the Lessee will withhold from this commission all taxes required by local, State, and Federal Law.

Appendix A to the agreement provided, among other things, that "for the full and proper performance of each completed dispatch made by Lessor under the terms of this agreement" the lessee agreed to pay 43% of the final net revenue from interstate and intrastate shipments transported by the lessor's truck, plus 100% of all fuel surcharges. The lessee agreed to provide "insurance administration and certain accounting functions" at a cost of $40 per month to lessor. Appendix A also provided that "[t]he remuneration

shall be paid to lessor after 3:00 p.m. local time on the 15th and last day of each month . . ."

(Mr. S), a manager who had worked for employer since 1978, testified that pursuant to the lease agreement, workers' compensation, cargo, bobtail liability, and vehicle liability insurance premiums were deducted from the truck portion of claimant's check. (He was not able to explain how the amount of workers' compensation insurance premium was calculated, other than to say it represented a percentage of the truck portion and not the driver portion.) Also deducted were an escrowed amount (which was held by employer for a certain amount of time, to defray the cost of road repairs) and a leasing charge. Added to the truck portion was a fuel surcharge, which Mr. S said was a surcharge authorized by the Railroad Commission to be passed on to customers and which the employer passed on as part of the truck's earnings. Mr. S said that if the amount of deductions exceeded the gross amount of the truck portion, the remainder would be deducted by employer from the driver portion. He also said that repairs and other expenses in excess of the truck portion would be paid by the driver out of his own pocket. Federal income tax withholding and FICA were deducted by the employer out of the driver's check.

Mr. S further stated that under the standard lease agreements, employer considers drivers their employees and not owner-operators. He said employer deducts workers' compensation insurance from the truck portion pursuant to the portion of the agreement which provides that lessor is responsible for the entire cost of operation, including insurance premiums. He also said that Mr. M drove the same size truck as did claimant, and accordingly operated under an identical lease agreement.

The claimant testified that he discussed the leasing arrangement with a representative of employer; he said he understood that the 43% was for the lease on the truck, but that it was also part of his wages, and that in fact the full 63% were the wages he brought in for the truck. He agreed that he paid for the fuel and the maintenance on the truck. He also said he understood the nature of some but not all of the deductions from his check, and that employer never explained the reason for the 43%-20% breakdown.

In a written closing statement, the carrier points to the lease agreement, which states that the 43% represents rental payments, and that the lessor is responsible for the entire cost of operating the equipment. The carrier contends that all charges against the truck do not constitute remuneration pursuant to the 1989 Act. It further asks that AWW be determined based on the claimant's actual earnings.

In its closing statement the claimant contends he was being paid for goods provided rather than being reimbursed by employer. Because any amounts owed if the deductions exceeded the truck payment would be taken from the driver's portion, claimant says, the employer clearly was treating the money going to claimant as a single entity subject to the employer's discretion as to reimbursement. He also says that testimony showed that the amount of workers' compensation premiums charged to claimant was based on the total amount of money that the truck brought in, although income benefits would be paid on a lower amount. Finally, he argues that Appendix A's provision allowing the lessor to bring to lessee's attention any possible errors "so that the Lessor's pay can be corrected," and that the lessee's judgment shall be final and conclusive "upon all matters including the

interest of Lessor in his payments for services rendered" indicates that the 43% represents payments for services.

The 1989 Act defines "wages" as "every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration." Article 8308-1.03(47).

Rule 128.1, which contains general provisions for AWW, also provides that an employee's wage shall include every form of remuneration paid for the period of computation of AWW to the employee for personal services. The rule states that an employee's wage includes, but is not limited to:

> (1) amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;
>
> (2) the market value of any other advantage provided by an employer as remuneration for the employee's services that the employer does not continue to provide, including but not limited to meals, lodging, clothing, laundry, and fuel; and
>
> (3) health care premiums paid by the employer. Rule 128.1(b).

The rule also provides that an employee's wage, for the purpose of calculating AWW, shall not include:

> (1) payments made by an employer to reimburse the employee for the use of the employee's equipment or for paying helpers; or
>
> (2) the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury." Rule 128.1(c).

In short, the hearing officer found that the equipment lease agreement provided for a semimonthly rental payment of 43% of the gross revenue derived from deliveries made in claimant's truck and fuel surcharges on intrastate deliveries; that the lease agreement provided for the deduction from the truck rental payments of employer's expenses for insurance and uniforms, and that an escrow amount was also deducted; and that the net truck payment paid to claimant under the lease agreement was payment for use of claimant's truck and not wages. Based upon the lease agreement and the testimony of the witnesses, we find there was sufficient evidence to uphold this determination.

We are not persuaded differently by claimant's argument that the employer effectively treated both the driver and the truck portion as the same, because deductions in excess of the truck portion would be taken out of the driver's portion. We do not believe this is dispositive of the issue, which is whether the truck portion constituted equipment reimbursement rather than wages. Whether or not such deduction may have violated the terms of the agreement or another provision of law is not for this forum to decide. Likewise

we are not persuaded differently by claimant's argument that because workers' compensation premiums were deducted from the truck portion, that amount should be included as wages.

In support of its argument, claimant cites Article 8308-3.05, which defines "motor carrier" as a person operating a motor vehicle over any public highway in the state for the purposes of providing transportation services or contracting to provide those services, and which defines "owner operator" as a person who provides transportation service for a motor carrier under contract,and who is an independent contractor. Article 8308-3.05(a)(3),(4). Article 8308-3.05(g) provides that a motor carrier and an owner operator may enter into a written agreement under which the motor carrier provides workers' compensation insurance coverage to the owner operator and the employees of the owner operator. If a motor carrier elects to provide that coverage, "the actual premiums, based on payroll, that are paid or incurred by the motor carrier for the coverage may be deducted from the contract price or any other amount owed to the owner operator by the motor carrier." Claimant argues that employer withheld insurance premiums under this provision, which dictates coverage for the owner operator and the employees; because employer collected premiums for both, compensation payments should be based on both amounts when the owner operator and the employee are the same.

Article 8308-3.05(g) allows motor carriers and owner operators to enter into the same type of written agreement the 1989 Act authorizes for general contractors and their subcontractors, insofar as workers' compensation insurance is concerned. In so providing, it specifically exempts the contracting motor carrier from the employer charge back

prohibitions of Article 8308-10.02. However, it does limit the amount charged to "actual premiums, based on payroll . . . paid or incurred by the motor carrier for the coverage . . . ." While we do not find that this language can convert non-wages into wages, it is clear that a motor carrier cannot deduct from an owner operator more than the actual amount of the premiums charged. However, this too is an issue for a forum other than this panel.

Upon review of the record, we find that the hearing officer's decision and order are supported by sufficient evidence. We accordingly affirm.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge

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