APPEAL NO. 931152

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art. 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on November 1, and November 16, 1993, (hearing officer) presiding as hearing officer. She determined that per diem payments to respondent (claimant) for food and lodging for out-of-town work assignments were wages properly included in the calculation of claimant's average weekly wages (AWW). She also determined the issue of the amount of the claimant's AWW; however, this is not an issue on appeal other than the effect of the determination on per diem on the calculation of AWW. The appellant (carrier) appeals stating that "[t]his appeal focuses solely on the hearing officer's ruling that meals and lodging were wages for purposes of calculating claimant's [AWW] and thus the hearing officer's conclusion of the claimant's [AWW]." The claimant urges that the decision be affirmed.

DECISION

Determining that the hearing officer erred in including per diem for meals and lodging during out-of-town trips by the claimant in his AWW for benefit purposes, we reverse and render.

The facts of the case on the issue stated at the beginning of the contested case hearing, "whether travel advances for meals and lodging were wages for purposes of calculating claimant's [AWW]," were not in basic dispute. The claimant, who was employed by a company which engaged in environmental drilling, was paid by the hour. He lived in the (city), Texas, area but also performed work in other out-of-town areas, sometime for several weeks. During times he worked out-of-town, the rig supervisor would give the workers $50.00 a day per diem to cover expenses for meals and motel rooms. According to the claimant, he would try to get a motel for $40.00 or under $50.00 and that the $50.00 really did not cover it. This was given to the workers in cash and was not included in the Internal Revenue Service W-2 forms or declared as wages or income on tax statements. The employees did not have to account for the expenditure of the $50.00. According to the testimony of employer's bookkeeper, $50.00 per diem is only paid if an employee is out-of-town for 24 hours. Otherwise, only a meal allowance is paid for less than 24 hours out-of-town and no per diem or allowance is paid for the time that a worker is working in town. The employer figures that $34.00 is for motel expenses and the remainder for meal expenses. The bookkeeper testified that the claimant was paid by the hour on the job and was provided a mileage allowance for time on the road. She testified that no tax is withheld for per diem allowances and that it is not reported to the IRS.

Section 401.011(43) defines wages as:

> all forms 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 any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration.

Regarding AWW, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 128.1 (TWCC Rule 128.1) provides in pertinent part:

(b)An employee's wage, for the purpose of calculating the [AWW] shall include every form of remuneration paid for the period of computation of [AWW] to the employee for personal services. 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.

(c)An employee's wage, for the purpose of calculating the [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.

As indicated, the facts are basically not in dispute. The question for our resolution, as we see it, is the application of the statute and rules to those facts. In so doing, we do not find any precedential Texas case authority directly on point. While the Appeals Panel has upheld a case allowing the inclusion of the value of the providing of a "demo" automobile in the calculation of wages (Texas Workers' Compensation Commission Appeal No. 93517, decided August 5, 1993) and upheld the denial of including a mileage allowance in the calculation of wages (Texas Workers' Compensation Commission Appeal No. 92119, decided May 4, 1992; Texas Workers' Compensation Commission Appeal No. 93209, decided May 3, 1993), we have not specifically addressed the issue of whether per diem to cover expenses for meals and lodging for out-of-town duty can be properly included in determining wages for AWW purposes. Both the 1989 Act and TWCC Rule specify that wages include every form of remuneration for personal services (emphasis ours), and include, among other items, the market value of "board" (meals) and "lodging" and "other advantage." Although not otherwise addressing reimbursements for employee expenses, the TWCC Rule does specifically state that wages for purposes of AWW does not include payment made to reimburse the employee for use of the employee's equipment or paying helpers. We do not read this to be an exclusive listing or conclude that all other reimbursed expenses are to be included in figuring wages for AWW purposes.

Professor Larson in his treatise (Larson, Workmen's Compensation Law, Vol. 2 § 60.12(a) (hereinafter "Larson")) provides:

> In computing actual earnings as the beginning point of wage basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board constituting real economic gain to the employee.

The bulk of the cases cited in L's treatise concerning meals and lodging involve situations where, as a part of the employment contract or arrangement, an apartment, trailer or other sleeping or living accommodation and/or meals on the job or at or near the work place are provided by the employer. These cases regularly hold that such items are a part of the wage. Of course, the market value of these items are specifically provided for in the 1989 Act and the TWCC Rules. However, the few cases mentioned in Larson concerning out-of-town travel allowances or per diem more generally classify them as reimbursements and do not consider them as a part of wages. The claimant cites a F case (Viking Sprinkler Co. v Thomas, 413 So.2d 816 (Fla. Dist. Ct. App. D1 1982)) mentioned in Larson which stated a $90.00 allowance which claimant received for living expenses while working out-of-town (which according to the claimant was "all the time") was properly included in computing AWW. Larson also cites another F case (Layne Atlantic Co. v. Scott, 415 So.2d 837 (Fla. Dist. Ct. App. 1982)) for the holding that payment of out-of-town motel expenses was not to be included in wages since it was nothing more than "make-whole" reimbursement. An A case (Moorehead v. Industrial Commission, 17 Ariz. App. 96, 495 P.2d 866 (1972)) is noted in Larson as holding that per a union contract claimant was given $100.00 per month travel allowance which amount was, according to the contract, an approximate reasonable reimbursement for the actual travel expenses was not includable since travel expenses did not constitute any financial gain to the claimant and such expenses would cease with cessation of employment. *See also* Bosworth v. 7-Up Distributing Co., 4 Va. App. 161, 355 S.E.2d 339 (1987). Also cited is a New Mexico case (Antillon v. New Mexico State Highway Department, 820 P.2d 436 (1991)) where per diem for out-of-town travel was not included in wages as a state employee's per diem, by law, is for reimbursement of expenses. *See also* Gonzales v. Mountain States Mutual Casualty Co., 105 N.M. 100, 728 P.2d 1369 (Ct. of App. 1986).

A recurring theme, with little exception, in Larson's treatise and the case notations cited in Larson and the language of the 1989 Act and TWCC Rules is that some advantage or financial or economical gain attaches to the claimant from the particular item in question to bring it within the ambit of wages. That is, if it merely reimburses him for an expense he sustains and does not provide any financial or economic gain for his performance of personal services for the employer, it is not a form of remuneration. Similar to mileage allowances which are provided to cover automobile expenses, Appeal No. 92119, *supra*, the per diem in this case applied to and was for the purpose of covering motel expenses and meals and was only paid when the claimant was out-of-town for over 24 hours. It was to be applied to the added expenses when an employee was sent away from his home and local work area. Indeed, the claimant himself indicated that it was not a financial or economic gain to him as the per diem barely would, and maybe did not, cover the actual

expense of the motel and meals.

Applying the 1989 Act and TWCC rules to the basically undisputed facts in this case, we hold that the per diem payments cannot be considered as remuneration which are to be included in determining the claimant's wages for purposes of AWW. So much of the hearing officer's decision and order that includes the per diem in AWW is reversed and we render a new decision on this part of the decision and order that the claimant's AWW is the AWW determined by the hearing officer less the amount of the per diem. The remaining part of the decision and order is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge