APPEAL NO. 93517

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on May 12, 1993, with the record being closed on May 19th. The appellant, hereinafter carrier, appeals the decision and order of hearing officer (hearing officer) that the calculation of the claimant's average weekly wage (AWW) shall include the fair market value of the vehicle provided to the claimant by his employer, which results in a $68.99 per week addition to such calculation. The respondent, hereinafter claimant, argues that the hearing officer's decision should be affirmed. To the extent that claimant's response raises additional points not made part of the record below, they are not considered herein.

DECISION

We affirm the decision and order of the hearing officer.

According to the record in this case, the claimant was employed as a salesman by . (employer), and was injured on (date of injury). The claimant testified that as part of his employment package he was furnished a "demo" vehicle, a 1992 Buick Skylark, for which he was charged $50 per month ($12.50 per week). He said that his previous employer, also a car dealership, had charged him $350 per month for the use of a comparable vehicle, so that there was a financial incentive for him to come to work for employer. (He said, however, that he earned less during the five weeks he was working for employer than he had at his previous job.) The claimant introduced into evidence a newspaper advertisement placed by employer on December 16, 1992, which said, "Experienced salespeople needed immediately . . . Excellent benefits, demo program, insurance and paid vacation." The claimant also introduced evidence concerning the retail price of a 1993 Buick Skylark, along with his own calculations of the monthly payment based on price, interest, tax, license and registration, insurance, and maintenance and repairs. The claimant's estimate was that the total monthly cost to purchase such a new vehicle would be $407.04, and $407.28 to lease, although he acknowledged some arbitrariness in his figures due to variations in such things as retail price and interest rate. He stated his belief that the total cost of a 1992 model would be about the same as a 1993, give or take about $200.

(Mr. D), employer's sales manager, testified for the carrier. He said he is in charge of the demo program; that new demo vehicles are never furnished to salesmen; and that the employer furnishes demos for its own benefit, because they usually are sold to customers by the salesmen who drive them, although after such a sale the salesman would be given another demo vehicle. He also said that the salesmen do not have unlimited use of the demos and must, for example, get the employer's permission before taking them out of the (county) County area.

As to the fair market value of the demos, Mr. D said the price of those cars at the time claimant was working there was $10,995 or $11,995. When the claimant asked whether that price would equate to $300 to $350 per month, Mr. D agreed that the price would be "somewhere in that area." Mr. D also said employer had changed its policy since claimant left, and that now employees were charged $250 per month for use of the demos, although that amount would be refunded if the employee sold eight cars during a month.

Included in the record below was a "Salesman Demonstrator and Sales Agreement" signed by the claimant, in which he agreed to operate and maintain the vehicle with care and diligence, to not take the car out of the county without employer's approval, to return the car to employer upon termination of his employment, and to accept responsibility for all traffic violations and fines. The employer agreed to furnish insurance on the vehicle (although claimant agreed to pay any deductible expense), and it reserved the right to replace the automobile at any time. The agreement also stated that "A $50.00 per month demo charge will be deducted."

The employer's wage statement also was made part of the record. Because the claimant had not worked for employer for 13 consecutive weeks prior to the injury, the wages of a similar employee were used. Although claimant said he did not know this employee, he did not take issue with the stated wages, except to the extent they did not include the value of the vehicle.

The hearing officer made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

3.As part of the terms of employment Claimant was provided with a current model Buick automobile demonstrator to use for his personal convenience with minimal restrictions as to its use.

4.The Employer-provided demonstrator was a form of remuneration provided by this Employer for the given period of employment for personal services rendered.

5.The Fair Market Value of the demonstrator was $350.00 per month less the $50 per month deducted by the Employer.

6.Claimant's average weekly wage should include the Fair Market Value of the car provided by the Employer which equals $300 divided by 4.348 = $68.99 per week.

(citations to record omitted)

CONCLUSIONS OF LAW

2.The demonstrator vehicle provided by this Employer to the Claimant constitutes renumeration [sic] for his performance of the job for which he was hired, and as such, constitutes "wages" as defined pursuant to Art. 8308-1.03(47) of the Act.

3.Therefore, the calculation of the Claimant's average weekly wage shall include the Fair Market Value of the vehicle provided to the Claimant by his Employer.

4.The Fair Market Value of the vehicle equals $350.00 less $50.00, which is $300.00 per month, and equates to a $68.99 per week addition to be included in the calculation of Claimant's average weekly wage.

The carrier urges two points of error on appeal: that the hearing officer erred in determining that a demonstrator car constitutes remuneration and should be included in computing the claimant's AWW, and that she erred in using the market value of a new car.

The applicable statute provides as follows:

"Wages" includes 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).

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

(b)An employee's wage, for the purpose of calculating the average weekly wage shall include every form of remuneration paid for the period of computation of average weekly wage to the employee for personal services. An employee's wage includes, but is not limited to:

(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 . . .

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

The carrier argues that something which is not provided in the employment contract as remuneration, but is merely the result of the employment, cannot be considered "other advantages" under the statutory definition, and that the cost or value of transportation is considered to be a "special expense" and hence not wages. The carrier cites case law and an Appeals Panel decision in support of its proposition.[1]

In Texas Workers' Compensation Commission Appeal No. 92119, decided May 4, 1992, this panel reviewed the comparable provision of the prior statute, TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (repealed), which stated that AWW "shall include the market value of board, lodging, laundry, fuel and other advantage which can be estimated in money which the employee receives from the employer as a part of his remuneration." That opinion noted that from 1917 to 1959, this provision contained additional language which read, "Any sums, however, which the employer has paid to the employee to cover any special expenses entailed on him by the act of his employment shall not be included." Prior to the repeal of this language, the Supreme Court held in Federal Underwriters Exchange v. Tubbe, 183 S.W.2d 444 (Tex. 1944) that the "special expenses" proviso expressly prohibited inclusion in wages of the cost or value of transportation furnished the employee to and from the places where he worked. In that case the court held that the value of employer's transporting the employee to various remote sites where he worked was analogous to reimbursing the employee for the cost thereof, which would constitute a "special expense."

In addressing a similar fact situation, the Appeals Panel held in Appeal No. 92119, *supra*, that mileage payments made to an employee were not wages because they were payments made to reimburse the employee for the use of her car, and as such came within the provisions of Rule 128.1(c)(1). It is true, as carrier argues, that the opinion in Appeal No. 92119 notes that the Supreme Court in *Tubbe* "did not expressly or impliedly hold that, but for the limiting language in the second provision of the statute, the cost or value of transportation furnished by the employer to the employee or reimbursement to the employee for furnishing his own transportation would be included in the employee's wages under the first provision . . . of Article 8309." It is clear, however, that no "special expenses" provision survives in the current statute, and the issue at hand must be determined with recourse to that statute. We would also note that furnishing an employee with a car for his own personal use--albeit with some restrictions--amounts to more than merely providing transportation to and from work. In addition, the facts of the instant case do not involve

[1]The carrier also argues that the Internal Revenue Code states that a demo vehicle is not a benefit to be included in calculating an employee's wage, and it attaches pertinent portions to the Code to its request for review. As this material was not introduced at the hearing, however, we will not consider it on appeal. We also observe that a determination with regard to taxable income is not necessarily relevant to the issue of AWW.

reimbursement for use of an employee's own vehicle.

Another case involving similar facts was Texas Workers' Compensation Commission Appeal No. 93209, decided May 3, 1993, wherein the Appeals Panel upheld a hearing officer's determination that mileage reimbursement to an employee for the use of his car should not be included in his gross wages. However, this panel also affirmed the hearing officer's determination that certain amounts paid as a bonus for collection activities should be included as wages, notwithstanding the carrier's argument that these amounts also represented mileage. That opinion stressed that an employer's characterization with regard to a category of remuneration does not bind the fact finder that such amount is excluded from AWW by virtue of the statute or rule.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We believe that the evidence below is sufficient to support the hearing officer's finding that the demo vehicle constituted remuneration for claimant's performance of his job and therefore constitutes "wages" as defined in the Act. The testimony of both witnesses, along with the "Salesman Demonstrator and Sales Agreement," confirm that it was employer's standard practice to provide vehicles to its sales staff, and to replace such vehicles as they were sold. Sales personnel were allowed to use the demos for their own personal use, with limited restrictions. That the furnishing of demo vehicles also inured to the benefit of employer, which profited by their sale, does not appear to make them any less of a benefit or remuneration to an employee. Clearly, part of claimant's job as a salesman, according to Mr. D, was to "show and hopefully sell" such vehicles to customers of employer. As can be seen by the examples listed in the statute (which are not exhaustive), there may be items provided by an employer that are not salary but which nevertheless will come within the definition of "wage." We affirm the findings and conclusions of the hearing officer on this point.

The carrier also argues that, even if the use of the demo vehicle was an "other advantage" under the statute, there was insufficient evidence to support a determination that the vehicle's net value was $300.00 per month. The carrier argues that the lease of a new car would amount to that much, and that the used nature of the cars plus the restrictions on their use made them worth less. We note that the claimant estimated that the purchase or lease price of a new vehicle would be around $400.00 per month. On cross-examination Mr. D testified to the approximate purchase price of the demo vehicles, and stated that this would amount to somewhere around $300 to $350 per month. The claimant also testified that he was charged $350 per month for a comparable vehicle when he worked for a previous employer. We find this is sufficient evidence upon which the hearing officer could have based her determination, and that such is not against the great weight and

preponderance of the evidence. Atlantic Mutual Insurance Co. v. Middleman, *supra*.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge