

APPEAL NO. 93566

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on June 1, 1993, in (city), Texas, before hearing officer (hearing officer) to decide two issues: whether the salary continuation received by the claimant for the period from April 6, 1992 through September 8, 1992, is considered weekly earnings after the injury; and whether the employer made a bona fide job offer to the claimant during the period of disability after September 8, 1992. The appellant, hereinafter carrier, does not appeal the hearing officer's determination that the employer did not make a bona fide offer of employment that the claimant was capable of performing within her physical limitations; however, it appeals the hearing officer's determination that the salary continuation is not "wages" as defined by the 1989 Act.

DECISION

We affirm the hearing officer's decision and order.

The claimant had been employed by (employer) for 15 years, most recently in the physical testing department where she tested fiberglass panels for stress. She had been diagnosed with carpal tunnel syndrome for which it was determined in a prior contested case hearing, upheld on appeal, that claimant had given timely notice. See Texas Workers' Compensation Commission Appeal No. 93012, decided February 12, 1993.

Claimant apparently worked light duty for employer from January until April 6, 1992, when it was determined that she would need surgery which was performed on June 9th. She returned to work on September 8, 1992, but did not return thereafter due to her inability to perform the duties allegedly assigned under a bona fide offer of employment. (At the hearing claimant's position was that she was terminated, while employer's witness stated claimant resigned. However, because the hearing officer's determination on the issue of bona fide offer of employment was not appealed, this opinion will not discuss the evidence adduced on this point, including the content of the offer and the physical limitations imposed upon the claimant.)

During the period of April 6 to September 8, 1992, it was undisputed that claimant received payments from employer under its "salary continuation program." According to employer's documents which were made part of the record, this program was a benefit provided to eligible salaried employees to protect those employees against the loss of base salary income when sickness or injury kept the employees from work for an extended period of time. Salaried employees who had suffered injuries either on or off the job were eligible for this program, although (Mr. F), employer's human resources manager, testified, and employer's documents also stated, that any workers' compensation income benefits received by an employee would be deducted from the salary continuation payments.

Both parties relied upon the 1989 Act's definition of "wage" in support of their

respective positions:

"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).

The claimant argued that wages must be provided for personal services, and that claimant indisputably provided no personal services during the period of time in which she received such payments. The carrier argued that the statute should be read broadly to include any "other advantage," and analogized to teachers who continue drawing salary in the summertime when they are not working, but based on previous personal service. The claimant contended that the phrase "other advantage" has been taken out of context by the carrier, and refers to non-pecuniary benefits of the sort listed in this statute.

We note at this juncture that while the issue raised but not resolved from the benefit review conference is whether the salary continuation should be considered "weekly earnings after the injury," the parties argued at hearing and on appeal, and the hearing officer found, that these amounts were not to be considered "wages." Article 8308-4.10 contains methods for determining a claimant's average weekly wage (AWW) for purposes of determining temporary income benefits (TIBS). Article 8308-4.23(c) provides that TIBS are payable at the rate of 70 percent of the difference between the employee's AWW and the employee's weekly earnings after the injury. The latter phrase is not defined within the Act, although the Commission in Rule 129.1 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 129.1) has determined that "weekly earnings after the injury" as used in Article 8308-4.23(c) for the calculation of TIBS means "wages" as defined in Article 8308-1.03(47). See Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993.

This panel has previously held that payments under a similar plan were not wages. Texas Workers' Compensation Commission Appeal No. 92691, decided February 8, 1993. There, as here, there was evidence that the plan was meant only to cover the gap between the employee's base salary and income benefits where the employee had suffered a compensable injury. (As such, it can be considered comparable to those supplemental payments by the employer, reimbursable by a carrier, which are contemplated by Article 8308-4.06, although there is no evidence that those statutory procedures were invoked here.) The employer's up front payments to the claimant clearly were not meant to displace income benefits that otherwise would be owing from the carrier, but rather were meant only to supplement them and to protect the claimant from interruptions in salary continuity. We find, as we did in Appeal No. 92691, *supra*, that these payments are not "wages" under the

Act.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge