

APPEAL NO. 990405

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 10, 1999, a hearing was held. She determined that respondent's (claimant) average weekly wage (AWW) was \$384.36. Appellant (carrier) asserts that the hearing officer raised and considered an issue not reported from the benefit review conference (BRC) and cited Texas Workers' Compensation Commission Appeal No. 92268, decided August 6, 1992; it also states that the employer continued "to provide" a place for claimant to stay after the injury but that claimant voluntarily moved out; carrier asks that the AWW not include the rental value of the farm house. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when he fell while at work injuring his right knee. There was one issue reported from the BRC and that concerned the correct amount of the AWW. The claimant testified that he began work in August 1998 for employer. He testified to moving out to the ranch to live on the premises where he would work. The first week he worked, he was paid over \$300.00 in wages. After about two weeks of work, his common-law wife joined him at the ranch but continued working at her job in town. There was no dispute as to the amount of wages paid in the weeks before the accident in _____. At the hearing a significant amount of argument involved whether claimant was paid the \$1,100.00 monthly wage for his work at the ranch or whether he was paid the \$1,100.00 monthly wage for both his and his wife's work at the ranch, so that his part of the monthly wage was \$550.00.

The hearing officer determined that the wages paid were paid to claimant alone, figuring a wage of \$275.00 per week. Although this part of the wage was not appealed, the hearing officer considered that the checks were made out to claimant, that a W-2 statement only listed claimant, and that the common-law wife testified that she did not work at the ranch, retaining her job in town. While there was testimony that the wife was expected to do certain things at the ranch, that claimant would not have been retained at the wage paid if his wife did not contribute at the ranch, and that advertisements for the job claimant took asked for a "couple" to be hired, the evidence was sufficient to support the determination that the AWW included a weekly wage of \$275.00 before the accident of _____.

Evidence of lodging provided first appeared in the testimony of claimant who said that when he took the job he moved into a house on the ranch. In addition, Carrier's Exhibit No. 1 included newspaper advertisements and a listing from the Texas Workforce Commission (TWC), the latter being where claimant said he learned of the job. The TWC notice may be reasonably read as not requiring a couple, it stated, "employer provides house and utilities for 2 + salary. 2nd person may have housekeeping duties."

It was in this context that the carrier states the hearing officer "sua sponte" raised the lodging "issue"; it cites Appeal No. 92268, *supra*, as authority for its assertion that the hearing officer erred in so doing. That case, however, dealt with an issue added by the hearing officer which involved a carrier's duty to set forth its reasons for disputing compensability of an injury and the time in which the carrier has to do that; the issues set forth by the BRC for the hearing in Appeal No. 92268 only involved injury and notice to the employer. Issues of injury and notice do not include whether the carrier timely or adequately controverted compensability, so the cited case could only control the issue of AWW before us and whether the hearing officer added an issue in considering lodging provided if lodging is not part of the AWW issue.

Whether lodging was provided and how it affects AWW is part of the issue of AWW, just as whether claimant's unemployment is a direct result of the impairment is a part of the issue of whether or not a claimant is entitled to supplemental income benefits (SIBS). The applicable section of the 1989 Act and the rules of the Texas Workers' Compensation Commission (Commission) that address AWW also discuss lodging or nonpecuniary wages. There does not have to be an issue of whether lodging provided is or is not part of the AWW. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(b) (Rule 128.1(b)) which provides that for purposes of AWW, a wage includes "every form of remuneration paid"; this rule also adds that such definition includes the market value of "lodging." The hearing officer did not commit error when she considered evidence of lodging provided, and elicited information as to the rental value and value of utilities provided, as part of the AWW.

Carrier also states that the employer continued to provide the house in question after the injury, but that claimant voluntarily moved out. Claimant testified that he knew he could not work for a while and that it would make it easier to obtain medical care if he moved back into the house he kept in Beeville, Texas. Carrier's argument stresses the aspect of the employer's offer of the house and claimant's failure to take advantage of that offer. Both Rule 128.1(b) and Section 408.045 use the word "provide." This aspect of AWW has arisen most often before in questions of premiums paid for health insurance. When they are provided after a claimant's injury, then the amount of the premium is not made part of the AWW. Another area addressed in AWW cases is payment for meals, which usually has been encountered when a worker has been in a travel status. In those cases, when the worker was working away from home and had been receiving a meal allowance when hurt, and when not in the form of a reimbursement, the value of the meals was part of the AWW, even though the worker would not receive it if working locally. See Texas Workers' Compensation Commission Appeal No. 972569, decided January 27, 1998.

Consideration of the entire applicable rule is also important to this case since the words, "to provide" do not make it clear whether an offer alone is sufficient or whether there has to be some form of acceptance. Both the inclusion portion of the rule, Rule 128.1(b), and the exclusion portion, Rule 128.1(c), use the word "advantage." To determine AWW, Rule 128.1(b)(2) says, "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" To exclude from AWW, Rule 128.1(c)(2) says, "the market value of any non-

pecuniary advantage that the employer continues to provide" The hearing officer could give some weight to the term "advantage" as indicating a need for receipt by the claimant.

In addition to closely examining the applicable rule, the hearing officer could also consider the wording of the TWC notice concerning this job, which listed various work to be done on the ranch and stated, "[L]ong hard hours. Employer provides house and utilities for 2 + salary," as indicative of a house and salary being provided so long as the various jobs were done and "long hard hours" were being expended. In this vein we note that both claimant and employer testified that claimant has not been terminated and has not quit; d (Ms. S), testifying as the bookkeeper and daughter of the owners, said that payments to claimant would have had to be renegotiated, however, if claimant had not been injured, since the common-law wife had not provided any service.

In the case under review, we cannot say that the determination that claimant's AWW includes the salary paid to him (\$275.00), usually by weekly check, and the value of the house and utilities in the amount of \$109.36, which together total \$384.36, is against the great weight and preponderance of the evidence or is contrary to the applicable statute and rules of the Commission.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge