

APPEAL NO. 991126

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 4, 1999. With respect to the single issue before her, the hearing officer determined that appellant's (claimant) average weekly wage (AWW) is \$401.81. The claimant appeals, urging that the hearing officer erred in finding that the claimant's nine cents per mile per diem was not a form of remuneration under Section 401.011(43), and erred in finding that the claimant's nine cents per mile per diem was paid primarily to defray travel expenses rather than to provide a financial or economic gain to the claimant. The claimant requests that we reverse the AWW determination and render a new decision that the AWW is \$549.15. The respondent (carrier) replies that the hearing officer's findings, conclusion, decision and order are supported by sufficient evidence and should be affirmed.

DECISION

Reversed and rendered.

The claimant was employed as an over-the-road truck driver for employer for approximately two and one-half years prior to sustaining an injury on _____. The claimant testified that he was paid 30 cents per mile, nine cents of which was identified by the employer on his paycheck as "per diem." The claimant testified that he was not required to submit any receipts to be paid the "per diem" and it was not provided for reimbursement of travel expenses. Any expenses incurred related to the truck such as oil, tolls, or motel if the truck was incapacitated, was identified as "reimb" and not part of the "per diem" compensation. The claimant testified that he usually slept in the sleeper cab of the truck and the only expense he incurred while on the road was food. The claimant asserted that the nine cents per mile "per diem" was a financial benefit, not reimbursement, and should be included in the AWW.

The carrier asserts that the nine cents per mile "per diem" was paid to the claimant to cover everyday expenses incurred by the claimant while traveling. The carrier argues that there is a clear correlation between the amount paid and the extent of the travel. The carrier's witness, Ms. K, an employee of employer, testified that the "per diem" was paid based only on miles driven, and the claimant was not required to submit any receipts.

The definition of "wages" in Section 401.011(43) includes:

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.

The Appeals Panel has stated that this definition makes clear that one must look beyond labels of "remuneration" or "per diem" to determine what the payments or advantages represent. Texas Workers' Compensation Commission Appeal No. 941044, decided September 16, 1994.

The hearing officer made the following finding of fact:

FINDING OF FACT

3. Claimant's nine cents per mile per diem was paid primarily to defray travel expenses rather than to provide a financial or economic gain to the Claimant for the performance of personal services and was not a form of remuneration.

The hearing officer cited Texas Workers' Compensation Commission Appeal No. 970578, decided May 15, 1997, in support of her decision. In that case, the claimant was a truck driver who was paid 22 cents per mile, seven cents of which was identified as a per diem for travel expenses. The claimant did not have to keep receipts for expenses and he was paid by the mile, no matter how far he had to drive and irrespective of whether the trip required an overnight stay. The Appeals Panel concluded that the hearing officer erred in including the seven cents per mile per diem in the claimant's AWW, reversed the determination of the hearing officer that the seven cents be included in the AWW, and stated:

In this instance, the claimant undeniably incurred travel expenses in the course of performing his duties as a long haul truck driver and the per diem was primarily a payment to defray those costs rather than a payment to provide a financial or economic gain to the claimant for the performance of personal services. Therefore, it is not properly characterized as a form of remuneration under the 1989 Act and the Commission's [Texas Workers' Compensation Commission] rules.

The claimant asserts that the facts in this case are different from Appeal No. 970578 and argues that the uncontroverted testimony was that the only expenses incurred were meals.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer, after considering the evidence, found that the nine cents per mile was not a form of remuneration. While the hearing officer relies on Appeal Decision

No. 970578, *supra*, that case involved facts different from this case. In this case, the claimant testified that the only expense he incurred while on the road was food. The carrier made the bare assertion that nine cents was paid to cover travel expenses, without any documentation to support its argument that it was not remuneration for personal services rendered. The claimant testified that the employer reimbursed him for all truck expenses such as oil, tolls, and motel if the truck was incapacitated, and this was identified as "reimb" on his paycheck. Based on the claimant's testimony that he was initially hired at 26 cents per mile, got raises to 30 cents per mile, and would not have worked for 21 cents per mile, it appears this was the amount of compensation agreed upon. The nine cents per mile paid to the claimant was for him to use as he wanted, just as the other 21 cents, without the need to specify to his employer what the money was used for. After reviewing the record and looking beyond the label "per diem" assigned by the employer, we believe that the nine cents, 30 percent of the 21 cents paid to the claimant based on the miles he drove, was remuneration for personal services rendered and should be included in the AWW based on Section 401.011(43) and Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1. We find that the hearing officer's determination that the nine cents per mile per diem was paid primarily to defray travel expenses rather than to provide a financial or economic gain to the claimant for the performance of personal services and was not a form of remuneration to be insufficiently supported by the evidence and so against the great weight and preponderance of the evidence as to be clearly wrong. Accordingly, we reverse the hearing officer's determination that claimant's AWW is \$401.81 and render a new decision that claimant's AWW is \$555.36 (22,179 miles at a rate of nine cents per mile divided by 13 equals \$153.55; \$153.55 + \$401.81 equals \$555.36).

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge