APPEAL NO. 991284

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 20, 1999. He (hearing officer) determined that the respondent's (claimant) average weekly wage (AWW) was $375.33, which included the market value of meals and lodging provided by the employer. The appellant (carrier) appeals this determination, contending error, as a matter of law. The claimant replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The essential facts of this case are undisputed. The claimant sustained a compensable injury on _____. He continued working at his preinjury wage until he resigned on September 13, 1998. His wages included a salary, plus food and lodging. He testified that the reason for his resignation was unrelated to his compensable injury. He vacated the employer-supplied premises on September 14, 1998. His salary, less food and lodging, was continued through September 24, 1998. The claimant obtained other employment at some undisclosed time and quit this job in mid-December 1998. On January 8, 1999, the carrier initiated temporary income benefits (TIBS).[1]

Section 401.011(43) defines wages as including the market value of board and lodging "that the employee receives from the employer as part of the employee's remuneration." Section 408.045 further provides that such "nonpecuniary wages" are not to be included when computing AWW "during a period in which the employer continues to provide the nonpecuniary wages."[2] *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(c)(2) (Rule 128.1(c)(2)).

It was not disputed that meals and lodging were provided by the employer. The claimant contends that when the employer stopped providing food and lodging, he was entitled to have its market value included in the computation of his AWW. The hearing officer agreed and included the market value of these nonpecuniary items in the claimant's AWW.

In Texas Workers' Compensation Commission Appeal No. 981344, decided August 3, 1998, the employer provided the claimant with an apartment while he was working. After the injury, the claimant could no longer continue to perform his preinjury job and the employer charged rent. The Appeals Panel held that the fair market value of the apartment

[1] Although the carrier began paying TIBS, disability was not an issue and the carrier reserved the right to challenge a claim of disability.

[2] The value of the meals and lodging is not in dispute in this appeal.

was to be included in AWW. The carrier in the case we now consider would distinguish Appeal No. 981344 on the grounds that, because the claimant voluntarily left his employment for reasons unrelated to the compensable injury, his nonpecuniary wages "were not 'stopped' by the employer, but were abandoned by the employee." We do not believe that the distinction between an employer "stopping" a nonpecuniary advantage and a claimant leaving the position for which the advantage is provided is determinative. Here the only issue is AWW, not disability, entitlement to TIBS or the rate at which TIBS is to be paid. What is critical is that the employer provided a nonpecuniary advantage to the claimant in the form of food and lodging before the injury, but at some point after the injury when AWW was determined was not providing these advantages. The reason why the advantages ended may have a bearing on the determinations of disability and TIBS entitlement, but not on the calculation of the AWW. Thus, in Texas Workers' Compensation Commission Appeal No. 962062, decided December 2, 1996, the employer provided the claimant an apartment. After the injury, the claimant's employment was terminated, including loss of the apartment, for violating the employer's policy on drug abuse. The market value of the apartment was still required to be included in the AWW calculation. Consistent with these determinations, we conclude that the hearing officer properly included the market value of food and lodging in the AWW wage calculation because, at the time AWW was calculated, the employer was not providing these advantages. The reason why is largely irrelevant to the issue before us.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge