

APPEAL NO. 991713

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 July 12, 1999. With respect to the single issue before him, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is \$664.86. The claimant appeals, urging that the hearing officer erred in determining that his hourly travel pay, flat rate pay for meals, and per diem pay for lodging are not included in the AWW. The claimant requests that we reverse the AWW determination and render a new decision that the AWW is \$779.97. The respondent (carrier) replies that the hearing officer's findings and conclusion are supported by sufficient evidence and should be affirmed.

DECISION

Reversed and rendered.

The claimant was employed as a laborer when he was struck by a crane, sustaining an injury to his back, shoulder, and left arm. The claimant was paid an hourly rate of \$10.00 and time and a half for overtime. The claimant traveled frequently, and when he traveled, he received \$5.00 an hour to and from the job site, \$3.50 for breakfast, \$3.50 for lunch, \$5.50 for dinner, and \$27.50 for lodging for each day of travel. The claimant was not required to provide receipts to show that he actually spent the money on food and lodging, and taxes were not withheld from these payments. The claimant asserts his AWW is \$779.97, based on regular and overtime wages, travel pay, meal pay, and lodging pay.

Ms. S, who oversees the employer's company policies, testified on behalf of the carrier. She stated that food and lodging money is reimbursement to help employees defray the cost of being out of town, and that the purpose of the money was to get employees that would be willing to travel out of town and stay overnight. The employer separately reimbursed actual out-of-pocket expenses for items such as equipment and fuel. The carrier asserts that the money paid for food and lodging are not remuneration, should not be included in the AWW, and that the claimant's AWW is \$664.86, based on only regular and overtime wages.

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.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 128.1(b) and (c) (Rules 128.1(b) and (c)) provide as follows:

- (2) An employee's wage, for the purpose of calculating the [AWW] shall include every form of remuneration paid for the period of computation

of [AWW] to the employee for personal services. An employee's wage includes, but is not limited to:

- (1) amounts paid to the employee by the employer for time off such as holidays, vacation, and sick leave;
 - (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; and
 - (3) health care premiums paid by the employer.
- (3) An employee's wage, for the purpose of calculating the [AWW], 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.

At the hearing, and on appeal, the claimant cites Texas Workers' Compensation Commission Appeal No. 941044, decided September 16, 1994, and Texas Workers' Compensation Commission Appeal No. 972569, decided January 27, 1998, in support of his position. In Appeal No. 941044, *supra*, the Appeals Panel reversed a hearing officer's determination that a \$32.00 per diem should not be included in claimant's AWW and remanded the issue for further consideration. In that case, the claimant was paid the per diem seven days a week, whether or not he traveled. Appeal No. 941044 stated that in deciding whether something is included as part of the AWW "one must look beyond labels of 'remuneration' or 'per diem' to determine what the payments or advantages represent." Appeal No. 941044 distinguished Texas Workers' Compensation Commission Appeal No. 931152, decided February 4, 1994, noting that in that case the employee was sent away from home and the local work area, and emphasizing that that situation differed from the situation presented in Appeal No. 941044, *supra*, where the payments were made to "ensure claimant's proximity to the . . . work location" and, thus, "are analogous to the 'lodging' or 'board' components of remuneration that are defined as 'wages' in the 1989 Act, for purposes of calculating the AWW."

Texas Workers' Compensation Commission Appeal No. 941532, decided December 30, 1994, was the appeal of the hearing officer's decision on remand in Appeal No. 941044. On remand, the hearing officer included the per diem in the claimant's AWW. Appeal No. 941532, *supra*, affirmed that decision, stating:

We believe the regularity of the payments, the fact that they were paid based upon a seven-day week, not just working days, and the fact that with the exception of Iowa, no travel expenses were actually incurred for which per diem could be viewed as "reimbursement," are sufficient evidence to support the hearing officer's decision that such amounts are remuneration and as such includable in the claimant's AWW. In the absence of evidence that there was reimbursable travel, such payments are analogous to the "lodging" or "board" components of remuneration that are defined as "wages" in the 1989 Act, for purposes of calculating the AWW. In any case, they would come well within "any form" of "remuneration," as the hearing officer has determined as a conclusion of law.

In Appeal No. 972569, *supra*, the Appeals Panel affirmed a hearing officer's determination that the lodging and \$10.00 per day meal payments the employer made to the claimant seven days a week, regardless of whether or not he was working, were properly included in the AWW.

The carrier cites Texas Workers' Compensation Commission Appeal No. 970578, decided May 15, 1997, in support of its position. 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.

In Texas Workers' Compensation Commission Appeal No. 982577, decided December 16, 1998, the Appeals Panel reversed a hearing officer's determination that a \$5.00 per hour "subsistence pay" was in the nature of a reimbursement for expenses, did not provide a financial or economic gain to the claimant, and was not included in the AWW. The Appeals Panel rendered a decision that the \$5.00 per hour should be included in the AWW computation, stating that although the claimant incurred travel expenses, the primary purpose of the \$5.00 per hour subsistence pay was to secure the claimant's presence at the employer's job sites, and constituted wages under the 1989 Act.

The parties stipulated to all of the potential AWW amounts based upon wages, travel pay, meal pay, and lodging pay. The hearing officer found that the claimant's AWW includes only regular and overtime wages and that the amounts paid the claimant for travel bore a direct relationship to his travel; he received them if he traveled and he did not receive them if he did not travel. We first address food and lodging payments. The facts of this case are distinguishable from Appeal Nos. 941532, *supra*, and 972569, *supra*, which involved a specific amount of money paid per day, seven days a week, regardless of working days. In this case, although receipts were not required, food money was only paid if the claimant was at the job site during the time the meal would be consumed and lodging was only paid if the claimant stayed overnight. Ms. S testified that if the claimant left for the job site at 10:00 a.m., he did not get paid for breakfast; if he returned home by 6:00 p.m., he did not get paid \$27.50 for lodging. The evidence indicates that food and lodging payments were reimbursement for expenses, not wages, and properly not included in the AWW.

We now address the travel pay of \$5.00 per hour. It was undisputed that travel pay was for actual time spent by the claimant to travel to and from job sites. The claimant testified that a majority of the time he drove a company-furnished vehicle and had a company credit card for fuel. The travel pay is similar to the "subsistence pay" which was included in the AWW in Appeal No. 982577, *supra*. The travel pay was not "reimbursement" for any particular expense and was paid to the claimant to use as he wanted, not for any particular purpose. As such, it appears to be in the nature of remuneration for personal services and should be included in the AWW based on Section 401.011(43) and Rule 128.1. Accordingly, we reverse the hearing officer's determination that the travel pay was not to be included in the AWW. We render a new decision that the AWW is \$667.74, based on regular and overtime wages and travel pay.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge