

APPEAL NO. 000341

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 January 19, 2000. The appellant (claimant) and the respondent (carrier) agreed that the claimant received \$350.00 a week in a separate check; that if the \$350.00 weekly payment is not considered to be part of his wages, his average weekly wage (AWW) is \$599.54; and that if the \$350.00 is included in his wages, his AWW is \$949.54. The hearing officer determined that payments of \$350.00 a week were reimbursements for expenses, were not remuneration within the meaning of the 1989 Act and Texas Workers' Compensation Commission (Commission) rules, and are not included in his AWW, and that the claimant's AWW is \$599.54. The claimant appealed, urged that the hearing officer erred in not including the \$350.00 weekly payment in his AWW, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that his AWW is \$949.54. The carrier responded, urged that the hearing officer properly applied the law to the facts, and requested that his decision be affirmed.

DECISION

We reverse and render.

The claimant testified that he lived in (state); that he worked for the employer for about a year; that during that time he worked in several states installing conveyor systems, but never worked in (state); that for the 13 weeks immediately preceding his injury, he worked at one location in Texas; that each week that he worked for the employer, he received a payroll payment that went directly to a bank and a check for \$350.00; that the \$350.00 was for living expenses that included meals and lodging; that he did not have to account to the employer how he spent the \$350.00; that the \$350.00 was sufficient to pay for meals and lodging; that he was paid \$350.00 a week for two weeks that he was at home; that taxes were not withheld from the \$350.00; and that reimbursement for mileage was paid in a separate check.

Ms. W, who works in human resources for the employer, testified that the employer's per diem policy basically provides for work-related living expenses to employees who have to work at an installation job site more than 50 miles from the employee's residence; that per diem is intended to cover work-related expenses when an employee is working away from his residence; that if an employee is not actively working at a job site, the employee is not eligible to receive per diem; that she does not have personal knowledge of the claimant being paid per diem for two weeks when he was not at a job site; that a job superintendent may look at individual circumstances and submit something in writing to authorize payment of per diem; that the time for an installation varies; and that she has heard that the average time for an installation is from six to nine months. Ms. W was asked on cross-examination "[b]ut isn't the company, in having that policy, making sure that it has qualified, experienced workers near the job site wherever it may be?" She responded "I would say in general,

yes.” On redirect examination, she was asked if “the purpose of the payments you made were for reimbursement expenses” and she replied “[t]hat is correct.”

At the hearing, both parties cited Appeals Panel decisions and a court of appeals case. In Texas Workers' Compensation Commission Appeal No. 991713, decided September 23, 1999, a decision cited by both parties, the Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 972569, decided January 27, 1998; quoted from the 1989 Act and Commission rules; commented on and quoted from some of the Appeals Panel decisions cited by the parties; and affirmed the part of the decision of the hearing officer that payments for meals and lodging were not included in the claimant's AWW. In Appeal No. 991713, the Appeals Panel stated that the claimant traveled frequently; that a predetermined amount was paid for breakfast, lunch, and dinner when any of them was missed because of the travel of the claimant; that a predetermined amount was paid for lodging for each day of travel; that food money was paid only if the claimant was at the job site during the time the meal would be consumed; that the amount for lodging was paid only if the claimant stayed overnight; and that the payments for food and lodging were reimbursement expenses, not wages, and properly were not included in the claimant's AWW.

The claimant also cited Appeal No. 972569, *supra*, and American Surety Co. Of New York v. Underwood, 74 S.W.2d 551 (Tex. Civ. App.-Waco 1934, writ ref'd). In Appeal No. 972569, the Appeals Panel wrote:

In support of his decision, the hearing officer cited American Surety Co. of New York v. Underwood, 74 S.W.2d 551 (Tex. Civ. App.-Waco 1934, writ ref'd). The Underwood case is a workers' compensation case and it concerned a traveling salesman who was paid a salary and, in addition thereto, the employer would reimburse the employee for his expenditures for meals and lodging while away from home in the discharge of his duties of his employment. The court held that the trial judge did not err in instructing the jury that the word "wages" includes the market value of board and lodging which can be estimated in money which the employee receives from the employer as part of his remuneration. The carrier in Underwood contended that, since the sums the employer paid the employee for board and lodging were restricted to the amounts actually expended by him, he received no pecuniary advantage from such reimbursement and that those sums were not part of his remuneration or wages. In affirming the judgment of the trial court in favor of the employee on the wage issue, the court stated:

Whether an employee maintains his own home or not, he must nevertheless have a place to sleep and food to eat, and some pecuniary advantage must ordinarily result to him from having these necessities supplied by his employer. Our statute does not require an injured employee to show the amount actually

saved by his absence from home while traveling at the expense of his employer, but makes the market value of his board and lodging paid by his employer a specific element of his average wages upon which his compensation is to be based. Appellant's contention is without merit.

In Texas Workers' Compensation Commission Appeal No. 941044, decided September 16, 1994, the Appeals Panel reversed a hearing officer's decision that a \$32.00 per day "per diem" the employee was paid, which was in addition to his hourly wage, was not to be included in his AWW, and remanded the case to the hearing officer. There was evidence that the per diem amount was paid to the employee seven days a week for food and lodging while the employee worked for the employer away from his home. In remanding the case, the Appeals Panel cited the definition of wages in Section 401.011(43) and stated:

We believe this definition makes clear that one must look beyond labels of "remuneration" and "per diem" to determine what the payments or advantages represent. Lodging and board described in the rule are undoubtedly "expenses" that a worker would have to bear regardless of the employment. However, we believe that the statute makes clear that in those instances, for example, where residence at or near a particular location is required, "board" or "lodging" furnished by the employer is part of weekly wage.

The carrier in the case under consideration relies on Appeal No. 931152, *supra*, for the proposition that the amounts the employer paid for the claimant's motel room and the amounts it paid the claimant for meals are not part of his remuneration. The carrier in Appeal No. 941044, *supra*, also relied on Appeal No. 931152, for the proposition that the per diem paid to the employee was not part of his remuneration. In addressing the carrier's argument in Appeal No. 941044 the Appeals Panel stated:

The carrier relied heavily on a prior decision of the Appeals Panel at the hearing and in its response. It is important to realize that the Appeals Panel has not simply ruled that any payments denominated as "per diem" are per se excluded from AWW. Texas Workers' Compensation Commission Appeal No. 931152, decided February 4, 1994, dealt with facts different from those here. In issue in that case was whether specific per diem allowances paid to workers who traveled out of town occasionally, for periods in excess of 24 hours, were includable in AWW. That case expressly noted that the employee had

been sent both away from home and the local work area. That is a situation distinguishable from payments made to secure an employee's presence at or near the "local work area" on a fairly continuous basis.

Following our remand in Appeal No. 941044, *supra*, the hearing officer in that case determined that the employee's per diem was part of his AWW and we affirmed that decision in Texas Workers' Compensation Commission Appeal No. 941532, decided December 30, 1994, 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 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.

\* \* \* \*

We further conclude that the carrier has not shown that the hearing officer erred in determining that the amounts the employer paid for the claimant's motel room and the amounts the employer paid him for meals were remuneration to be included in the computation of his AWW. To the extent that Appeal No. 931152, *supra*, may appear to conflict with the court's decision in Underwood, under the particular facts presented in this case, we find the decision in Underwood to be dispositive of the issue presented in this appeal.

We reverse the decision of the hearing officer and render a decision that the \$350.00 weekly per diem payment for food and lodging is included in the claimant's AWW and that his AWW is \$949.54.

Tommy W. Lueders  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Gary L. Kilgore  
Appeals Judge