

APPEAL NO. 001246

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 10, 2000. The hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$594.29. The appellant self-insured (referred to as "carrier" or "employer" herein, as applicable) appealed, contending that the hearing officer erred in including in the AWW: (1) bonuses earned during the applicable 13-week period but not paid during that period; and (2) a portion of a Fair Labor Standards Act (FLSA) settlement paid to claimant for back wages. The claimant responded, urging affirmance.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant's AWW is \$594.29. Carrier asserts that the AWW should not have included: (1) bonuses earned but not paid during the applicable 13-week period before the injury; and (2) a settlement amount paid from employer to claimant pursuant to the FLSA. Carrier asserts that any bonuses were earned during the 13-week period but were not wages "paid," so they are not properly included in the AWW amount, citing *Tex. W.C. Comm'n*, 28 TEX. ADMIN. CODE § 128.1(b) (Rule 128.1(b)). Carrier also contends that the hearing officer erred in stating that the Employer's Wage Statement (TWCC-3) in evidence was based on the wrong dates for the 13-week period. Claimant worked 13 weeks before the injury.

Rule 128.1 states, in pertinent part:

(b) 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.

Section 401.011(43) states:

"Wages" 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.

Concerning whether the wage statement contained the wrong dates, employer's wage statement said the 13-week period began July 29, 1997, and ended on October 26, 1997. The hearing officer noted that the parties stipulated that the 13-week period was from July 29, 1997, to October 27, 1997. The hearing officer stated that incorrect dates were used on the Employer's Wage Statement (TWCC-3), so the "computations of [AWW] are incorrect *ab initio*." Carrier contended that claimant's AWW was \$440.34. The hearing officer noted that some of claimant's pay periods had 15 days and others were 16 days in length. She computed claimant's daily salary using claimant's pay and the number of days worked per pay period.

Texas Workers' Compensation Commission Advisory 96-16 (October 11, 1996) states that an employer can adjust the 13-week period up to one week to coincide with its actual pay periods. However, the advisory goes on to state that "[t]he ability to adjust the 13 weeks is one of convenience to the carrier and the employer. If at a dispute resolution proceeding it is found that the adjustment produced a different AWW than that which is produced using the stricter standard, the carrier will be liable for this second, possibly higher, amount." Additionally, we note that claimant testified that the wage statement was not correct. We perceive no error in the hearing officer's determinations in this regard.

Carrier contends the hearing officer erred in determining that claimant's AWW included bonuses earned during the 13-week period, but not paid during that period. The amounts of the bonuses were not in dispute. Carrier also does not specifically dispute on appeal that claimant earned the bonus amounts during the 13-week period. The Appeals Panel has concluded that a bonus earned during the 13-week period is included in the AWW, even if it was not paid during the 13-week period. For example, if a claimant was paid an annual \$5,000.00 bonus on Christmas Day, and then sustained an injury on the following January 1, the entire \$5,000.00 would not be considered part of the AWW. Instead, the annual bonus would be considered as having accrued over the entire year. See Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. This is because the bonus is considered "payable" and the Appeals Panel has chosen not to ignore the language of Section 410.011(43) which states that "wages" includes all forms of remuneration "payable" for a given period to an employee for personal services. Rule 128.1(b) states that an employee's wage shall include every form of remuneration "paid" for personal services. Rule 128.1 also states what an employee's wage "includes": amounts "paid"; but then also states the things the AWW includes but is "not limited to." We conclude that the bonuses earned during the 13-week period are

“forms of remuneration payable” to claimant for personal services. We perceive no error in the hearing officer’s determination regarding the bonuses.

Carrier contends the hearing officer erred in including in the AWW a portion of a FLSA settlement paid to claimant. The settlement was paid by the employer to claimant and all of the employer’s sales representatives in 1999. Carrier asserts that these monies were not “payable” to claimant in 1997 because they were not paid until 1999 and because she was being paid pursuant to a salary agreement in 1997. Carrier contends that wages “payable” does not equate to wages “earned.”

In evidence is a “receipt for payment of back wages” signed by claimant. It states that claimant acknowledges “receipt of payment in full from [employer] for the period beginning with the workweek ending June 6, 1997, through the workweek ending June 4, 1999 of unpaid wages due [to claimant]. . . .” The amount of the settlement payment that was paid is not in dispute. Carrier also did not dispute the actual amount found applicable to the 13-week period. The sole issue is whether the hearing officer should have included in the AWW *any portion* of the settlement applicable to the 13-week period.

In this case, the hearing officer could have determined that the “back wages” were wages that were “payable” to claimant during the 13-week period, pursuant to a settlement pursuant to the FLSA. Claimant said the settlement amount represented back pay for five hours per week for the period from June 1997 through June 1999. Claimant testified that the settlement represented payment for five hours per week in back wages for the applicable two-year period, but that she worked more than the “extra” five hours per week. Claimant said employer “used” the sales representatives “80 to 90 hours per week” but paid them for about 40 hours per week. We perceive no error in the inclusion in the AWW of the FLSA settlement amounts.

We affirm the hearing officer’s decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O’Neill
Appeals Judge