

APPEAL NO. 010568

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 February 26, 2001. The hearing officer determined that the supplemental income benefits (SIBs) rate for respondent (claimant) is \$907.45. Appellant (carrier) appealed this determination on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

There is no issue of SIBs entitlement in this case. The issue in this case is the SIBs rate. Carrier contends the hearing officer erred in determining that the SIBs rate in this case is \$907.45. Carrier first asserts that claimant did not prove her "true earnings" by producing a document called an "agent summary." Section 408.144(b) states that SIBs are to be calculated by "subtracting the weekly wage the employee earned during the reporting period" Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 130.101 and 130.102 (Rules 130.101 and 130.102) indicate that SIBs are to be calculated by adding actual and offered wages for each week of the filing period. "Actual wages" is not defined. Rule 130.101(9) defines "wages" to include, "[a]ll forms of remuneration payable for personal services rendered during the qualifying period as defined in Texas Labor Code, § 401.011(43), including the wages of a bona fide offer of employment which was not accepted." Section 401.011(43) states that "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." We have said that, in calculating a self-employed claimant's wages during the filing period, business expenses may be deducted to arrive at the earnings. Texas Workers' Compensation Commission Appeal No. 990372, decided April 5, 1999 (Unpublished).

Claimant testified that she works as an independent contractor for (CS Company) and that she is in sales. She said she is paid advances against commissions. Claimant testified that she is paid 60% of the commissions she earns and 40% is held in a "bonus account," and cannot be paid to her until the policy she sold is retained for one year. Claimant testified that there were times when the account "flipped" and was in negative numbers because of lack of retention. She said she has not been paid any amounts from the bonus account. Claimant did not attach the agent summary to her Application for [SIBs] (TWCC-52), but she did offer check stubs showing amounts paid to her for advance commissions. The hearing officer indicated that there was nothing that made him doubt claimant's veracity about the amounts paid to her by CS Company. We note that there is no issue before us regarding discovery, denial of subpoena, or denial of a continuance. The issue before us on appeal is adequacy of evidence to prove earnings and expenses. We have reviewed the evidence and we conclude that the hearing officer

could find from the evidence that claimant's income from CS Company were as shown by the check stubs included in the record.

Carrier next contends that the hearing officer erred in permitting the deduction of expenses for claimant's cellular telephone, automobile, and pager. Carrier asserts that claimant may have used them for personal use. Claimant testified that she did not have a cellular telephone or pager before this job, that she does not use them for personal use, she does not have any children she calls, and that her husband is her boss and her calls to him involve work. Claimant said she keeps a business mileage diary to log her miles for business use. The hearing officer apparently believed claimant's testimony regarding personal use to be credible. We perceive no error.

Carrier contends the hearing officer erred in permitting claimant to deduct expenses of \$30 per month for premiums for "errors and omissions coverage." Claimant said she did actually pay the premiums and she produced a letter from CS Company that says it "required" that she carry it. We perceive no error.

Carrier contends the hearing officer erred in permitting the deduction of automobile expenses based on a rate of 28 cents per mile. Carrier asserts that the hearing officer should have required that claimant prove her exact expenses for the automobile she used in her business, rather than permitting a standard 28 cents per mile deduction. Carrier also asserts that no deduction should be permitted for depreciation, which is included in the 28 cents per mile deduction. Claimant said she kept a mileage diary to document her business mileage and that she takes an IRS deduction on her taxes for this mileage. Claimant said she did not claim expenses for gasoline or other automobile expenses, but used this standard 28 cents per mile deduction instead. In a January 24, 2001, letter, Mr. G, a certified public accountant, stated that claimant's expenses are normal for her line of work. We note that carrier cited Texas Worker's Compensation Commission Appeal No. 001131, decided June 28, 2000, in support of its contentions in this regard. However, we conclude that, under the facts of this case, the hearing officer could determine that the standard deduction of 28 cents per mile for automobile expenses constitutes a valid expense that can be deducted to determine claimant's wages earned during the qualifying period. We perceive no error in the hearing officer's determination of expenses for claimant's automobile.

We have reviewed the complained-of determinations and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

Judy L. Barnes
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge