APPEAL NO. 011274
FILED JULY 25, 2001

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 11, 2001. With respect to the issue before her, the hearing officer determined that the appellant's (claimant) average weekly wage (AWW) is $394.74. The claimant contends that the hearing officer erred in her determination that sums paid to the claimant pursuant to a covenant not to compete (CNC) should be excluded from calculating AWW. There is no response from the respondent (carrier) in the file.

DECISION

Reversed and remanded.

The claimant was employed by employer, from August 1999, until March 31, 2000, as a marketing representative, also known as an initiator. The initiator makes initial contact with potential clients, making about 550 calls a week. If the claimant met her goal to set 5 meetings a week with potential clients, then her compensation would be about $70,000 per year. Clients on her list to contact had to have net worth of 35 million dollars.

The claimant testified that she was hired at a base salary broken down as salary, bonuses, and a CNC. She was paid $2,000 per month, according to the CNC, not to contract with another company while she was with the employer. The claimant testified that she never understood that the $2,000, paid monthly pursuant to the CNC, was anything but wages.

Regarding the contract of employment, the CFO for the employer testified that potential employees can ask about the employment contract and they are given time to read it and ask questions about it. The provisions of the contract regarding the CNC are explained so that the newly hired employees are aware that the money for the CNC is not wages and does not figure into payroll tax. She further testified that if they do not sign the agreement they are not hired. She explained that the CNC is a promise to not compete for a period of time, during and after employment, for which the employee is paid and claims the money is not wages; it is consideration to not do anything against the company. It does not require service. As an example, she points to the fact that she missed three weeks of work and was still paid $2,000 for the CNC. The $2,000 payment for the CNC is for a 3-month term that automatically renews unless a party disagrees and wants to terminate the agreement. The CFO notified the claimant in March 2000 that the claimant's contract would not be renewed and the claimant received a check in March for the CNC payment. According to this witness, the claimant did not have to render any personal services to receive the money for the CNC. However, we note the payments for the CNC stopped shortly after the claimant's employment terminated.

In regard to the other portions of the claimant's remuneration, the CFO explained that bonuses varied based on phone calls and other factors. The claimant testified that she was paid bonuses according to a very complicated structure. The CFO testified that the claimant's salary was an additional $2,000, but the claimant did not get paid if she was not at work. With respect to the other "fringe benefits," the CFO testified that the $37.12 on the claimant's wage statement was for insurance that was paid for by the claimant and that she believed the kitchen privilege was worth about $55 a month per person so $27.50 was deducted from the employees wages. The claimant testified that she believed the value of the kitchen privilege was greater than the amount deducted from her wages, although she did not testify as to a numerical value on the privilege.

The hearing officer determined that the claimant's AWW for the 13 weeks prior to the injury was $394.74. The hearing officer excluded the $2,000 monthly consideration paid to the claimant under the written CNC, stating it does not constitute wages, and any value for the kitchen privilege.

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:

> (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.
>
> (c) 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 CCH, the carrier argued that the payments under the CNC were not paid to the employee for personal services because she did not have to do anything to earn the payment. The claimant testified that she had a duty, pursuant to the CNC, to not divulge any information about the employer's methods of operation and its clientele, among other things. The $2,000 per month paid to the claimant was for her to use as she wanted. *See* Texas Workers' Compensation Appeal No. 991126, decided July 8, 1999.

The employer set up the CNC to be nontaxable for payroll purposes, however, the overriding reason the employees are asked to sign a CNC, is to protect the employer's fundamental proprietary interests and trade secrets. From a workers' compensation perspective it is untenable to see the wage package as anything other than a means to attract qualified employees.

After reviewing the record, and looking beyond the label assigned by the employer, the $2,000 paid to the claimant was remuneration for personal services rendered and should be included in the AWW based on Section 401.011(43) and Rule 128.1. We find that the hearing officer's determination that the $2,000 monthly consideration under the written CNC was not a form of remuneration to be insufficiently supported by the evidence and so against the great weight and preponderance of the evidence as to be clearly wrong. Accordingly, we reverse the hearing officer's determination that the claimant's AWW is $394.74 and remand for the hearing officer to determine the claimant's AWW, including the payments pursuant to the CNC.

In her appeal the claimant also complained that at the CCH the hearing officer kept interrupting her, and that she was being rushed at the benefit review conference. The claimant also contends that the hearing officer should have included other amounts in the calculation of AWW, such as a "kitchen privilege." With respect to those determinations, the claimant failed to meet her burden of proof, consequently, those determinations are not against the great weight and preponderance of the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is

received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No.92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge