

APPEAL NO. 950320

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 25, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant's (claimant) average weekly wage (AWW) was \$350.22, which did not include any amount provided for meals and lodging while claimant worked on construction at sites away from the employer's home office. Claimant asserts that his AWW should include the value of such expenses since he asserts that he was always away from the employer's home site and claimant maintained no local residence. Respondent (carrier) replied that the decision should be upheld.

DECISION

We affirm.

Claimant had worked for (employer) over one year when he fell off a low scaffold and hurt his back. The only issue at the hearing was the amount of AWW. Claimant argued that his AWW should not include two weeks in which he stated he was not able to work within the 13 weeks immediately before his accident. A substantial amount of the testimony addressed the two weeks in question with claimant saying that snow in March in (state) prevented work and another week in (city) was unproductive because he and others had to wait on other parts of the construction. Employer countered these points by indicating that work did not come to a stop with snow in (state) and that work was provided in the home office during the week claimant described as having been spent waiting in (city); employer added that claimant did not show up when work was at the home site. The hearing officer determined AWW at \$350.22, rather than the \$300.03 calculated by carrier, without counting the two weeks detrimental to claimant; carrier did not appeal that point.

Claimant testified that when work was at least 100 miles from the home site, benefits were provided. He stated he was given \$70.00 a week in cash for food, employer provided lunches to the workers at the site, and employer provided a motel room for every two workers. Claimant estimated the lunches to be worth \$3.00 apiece and the lodging as approximately \$105.00 per week (one-half of approximately \$210.00 per week per room for two workers) and asked that these amounts be added to his AWW. Claimant acknowledged that each week he had to provide receipts for meals purchased with the \$70.00 that had been given to him; the evidence also showed that no more than \$70.00 was given even if he provided more than \$70.00 in receipts.

Claimant argued that since he did not maintain a home at the employer's home site, the lunches, lodging, and money for other food amounted to an "advantage" which was remuneration. Claimant clearly testified though that these provisions were provided to cover expenses when over 100 miles from the home site. The claimant testified that he was on the road the great part of the 13 weeks involved in AWW, but not all the time; he also did not testify that he was on the road all the time since first starting to work for

employer. Employer did not report any expenses paid the claimant as taxable wages. Since the reimbursement employer provided was limited to expenses incurred while away from the home site, it was not provided for "the employee's services" as set forth in Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 128.1(b)(2) (Rule 128.1(b)(2)).

Claimant's argument sought to distinguish this case from the facts in Texas Workers' Compensation Commission Appeal No. 931152, decided February 4, 1994. That case, too, involved reimbursement for expenses while away from the local area for a period of weeks at a time which were not part of AWW. We do not read Appeal No. 931152, *supra*, as significantly different from the case on review and conclude that it is not distinguishable.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She determined that lodging, money for food, and meals provided were all reimbursement and/or "not remuneration" for personal services rendered. The evidence as provided by employer and by claimant (to the extent that he agreed that these amounts were only provided while away from the home site, that he provided receipts for food purchases made with the \$70.00 employer had given him, that employer provided lunches at the work site, and employer paid directly for motel rooms) sufficiently supported the findings of fact summarized in the determination set forth above. The findings of fact sufficiently support the determination that claimant's AWW was \$350.22.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge