

APPEAL NO. 032882
FILED DECEMBER 18, 2003

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 July 1, 2003. Because hearing officer 1 is no longer employed by the Texas Workers' Compensation Commission (Commission), the parties agreed that instead of conducting a second CCH, (hearing officer 2), would review the file and tape recording of the proceeding and issue a decision and order. Hearing officer 2 resolved the disputed issues by determining that the appellant's (claimant) average weekly wage (AWW) is \$413.50, and that the claimant is not estopped from raising the AWW issue. The hearing officer's determination on the estoppel issue has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals, contending that a "per diem" payment of \$45 a day should be included in the claimant's AWW pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.1(3)(D) (Rule 126.1(3)(D)). The respondent (carrier) responds, urging affirmance citing Appeals Panel decisions in support of its case.

DECISION

Affirmed.

The claimant, a portrait photographer, traveled to various stores selling packages of photos that he took. The claimant was paid \$45 a day (dependent on the one way estimated mileage) for the days the claimant worked away from his home. The claimant testified that he was not required to turn in receipts and that he made some money on the allowance. The time and travel reimbursement report signed by the claimant contains the statement that the employee "did incur food and lodging costs." The "expensive report" indicates the \$45 was for \$35 "per diem or Lodging" and \$10 for "Meals." The claimant contends this amount should be included in the AWW pursuant to Rule 126.1(3)(D). The pertinent part of Rule 126.1(3) states:

- (3) Pecuniary Wages—Wages paid to an employee in the form of money. Examples of pecuniary wages include, but are not limited to:

* * * *

- (D) Any monetary allowance such as for health insurance premiums, vehicle/fuel, food/meals, clothing/uniforms, laundry/cleaning, or lodging/housing/rent; [Emphasis added.]

The carrier contends that the Appeals Panel has generally held such amounts payable for travel expenses were not included in AWW citing Rule 128.1(c)(1). That rule states:

- (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, for paying helpers, for reimbursing actual expenses related to employment such as travel related expenses (e.g. meals, lodging, transportation, parking, tolls, and porters), or reimbursing mileage up to the state rate for mileage [Emphasis added.]

The claimant counters that Rule 128.1(c)(1) was amended by adding the emphasized portion and that Rules 126.1(3)(D) and 128.1(c)(1) should be read together and if the payments are monetary allowances rather than reimbursement for actual travel expenses incurred by the employee then the monies should be included in the AWW. The claimant stresses the provision in Rule 128.1(c)(1) "reimbursing actual expenses" and that the claimant did not have to submit receipts for lodging and meals.

Rule 128.1(c) was amended effective May 16, 2002 (27 Tex. Req. 4036), to add the emphasized portion of Rule 128.1(c). Our review of the preamble of the amendment (*id*) indicates that the amendment in subsection (c) was "designed to provide clarification, include a reference to the definition and examples of pecuniary and nonpecuniary wages in § 126.1. . . . examples of exclusions to the AWW related to expenses are provided in Section (c)(1)." A commenter indicated that the subsection needed clarification on the issue of "per diem" compensation and whether it constitutes a component of the AWW. It was noted that most Appeals Panel decisions do not indicate that per diem constitutes a component. Another commenter noted that Section 408.042(e) does not allow wages that are not reportable for federal income tax purpose to be considered in calculating the AWW. The Commission responded:

Regarding the per diem compensation, the commission has modified the rule to specifically exclude reimbursement for employee's expenses (i.e. meals, lodging, transportation, parking, tolls, porters, etc). These expenses are reimbursement for out-of-pocket expenses related to employment and not wages. (*Id* at 4039)

The hearing officer's determination that the per diem payment was a partial reimbursement for lodging, meals, and incidental travel costs is supported by the evidence including the claimant's clarification on the travel reimbursement report that he did incur food and lodging costs. We believe the Commission's commentary on the amendment to Rule 128.1(c)(1) makes clear that it intended to exclude such reimbursement expenses from the definition of wages.

For the reasons stated, we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance Insurance Company**, an **impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLEY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge