APPEAL NO. 181637
FILED OCTOBER 11, 2018

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 April 12, 2018, and continued with the record closing on June 13, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a lumbar disc herniation at L5-S1; (2) the appellant/cross-respondent (claimant) had no disability resulting from the compensable injury, from June 4, 2017, through the June 13, 2018, date of CCH; and (3) the claimant's average weekly wage (AWW) is $743.44 based on multiple employment. Also, the ALJ resolved the issue of "[w]hat is the amount of [the] [c]laimant's post-injury earnings (PIE) after January 24, 2017?" by determining the PIE amount for that period in dispute.[1]

The claimant appealed, disputing the ALJ's extent of injury and disability determinations. Additionally, the claimant appealed a portion of the ALJ's PIE determinations that were not favorable to him and attached documentation that had been admitted into evidence. The respondent/cross-appellant (self-insured) responded, urging affirmance but it also filed a request to correct clerical errors and, in the alternative, a contingent appeal regarding the ALJ's PIE determinations. The self-insured asserts the ALJ "appears to have inadvertently copied the dates for two-week time periods but copied the monetary amounts for one week time periods in her [f]indings and [c]onclusions regarding [PIE]" for the period after January 24, 2017, through August 12, 2017. Also, the self-insured requests a clerical correction or reversal be issued to the ALJ's findings and conclusions to change the amount of PIE, after August 14, 2017, from $0 to $619.51. The claimant did not respond to the self-insured's cross-appeal.

The ALJ's determination that the claimant's AWW is $743.44 based on multiple employment has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed in part, and reversed and remanded in part.

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[1] We note that the parties actually litigated the PIE issue from January 24, 2017, rather than after January 24, 2017.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), that consisted of a lumbar disc protrusion at L4-5. It is undisputed that the claimant had multiple employment on the date of his injury, (date of injury). The claimant's employer, (Employer), is the claim employer, and (Non-Claim Employer) is the non-claim employer. The claimant sustained a compensable injury while working for the claim employer on (date of injury). The claimant's last day of employment with the claim employer was (date of injury).

The claimant continued to work for the non-claim employer as an "employee" until August 14, 2017. The claimant moved from Texas to (state) in August 2017; however, he continued to work for the non-claim employer as an "independent contractor" after August 14, 2017.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are 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); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

## EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to a lumbar disc herniation at L5-S1 is supported by sufficient evidence and is affirmed.

## DISABILITY

The ALJ's determination that the claimant had no disability resulting from the compensable injury, from June 4, 2017, through the June 13, 2018, date of CCH is supported by sufficient evidence and is affirmed.

## PIE

The issue before the ALJ as reflected on the Benefit Review Conference (BRC) Report was "[w]hat is the amount of [the] [c]laimant's [PIE] after January 24, 2017?" 28 TEX. ADMIN. CODE § 129.2(b) (Rule 129.2(b)) provides that lost wages are the difference between the employee's gross AWW and the employee's gross PIE. If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost

wages. Rule 129.2(c) provides a non-exhaustive list of what PIE shall include. Rule 129.2(d) provides what PIE shall not include.

The self-insured states special rules apply for the calculation of PIE for an employee with more than one employer. The self-insured states that the calculation of PIE is determined by whether the change in earnings was caused by the compensable injury and references Rule 122.5.

Rule 122.5(f) states:

> (f) Employees who file Multiple Employment Wage Statements are required to report all changes in employment status and/or earnings at the Non-Claim Employer to the carrier until the employee reaches maximum medical improvement (MMI).
>
> (1) The employee shall report all changes in employment status at the Non-Claim Employer including termination or resignation within 7 days of the date the change takes place.
>
> (2) The employee shall report within 7 days of the end of the pay period in which a change in earnings at the Non-Claim Employer related to the compensable injury took place. This would include both reductions and increases in wages as compared to the prior week as long as the difference was caused by the compensable injury such as because the employee's ability to work changed or the employer was more or less able to provide work that met the employee's work restrictions.

The preamble to Rule 122.5 states that House Bill 2600, 77th Texas Legislature made additions to Section 408.042, AWW for Part-Time Employee or Employee with Multiple Employment,[2] to address employees with multiple employment. The preamble to Rule 122.5 states, in part, that:

> Based on these changes, employees can now report wages from other jobs they held at the time of the injury to influence the [AWW]. The [Texas Department of Insurance, Division of Workers' Compensation (Division)] is required to specify by rule how this other wage information is to be collected and distributed. To avoid any undue confusion and to improve

[2] Section 408.042(e) provides that for an employee with multiple employment, only the employee's wages that are reportable for federal income tax purposes may be considered. Section 408.042(e) further provides that the employee shall document and verify wage payments subject to this section.

> the clarity of the rules, the [Division] adopts new [Rule] 122.5 to address the inclusion of wages from multiple employers. This rule provides for the reporting of wages from the Non-Claim Employers. The new rule clearly states expectations so that all system participants will understand the requirements that the Act and rules place on them with the purpose of improved benefit delivery, reduced disputes and violations and ease in holding participants accountable for their actions and inactions.

Furthermore, the preamble states that:

> Based on public comment, subsection (f) was added to place the requirement on injured employees to notify their carrier of all changes in employment status and/or earnings at the non-claim employer until the injured employee reaches [MMI], which could potentially be up to 104 weeks. The subsection essentially requires employees to report the same sorts of changes that a Claim Employer is required by [Rule] 120.3 (relating to Employer's Supplemental Report of Injury) to report to the carrier on the Supplemental Report of Injury. However, timeframes are slightly different in an attempt to better line up reporting duties with carrier payment duties. The reason that this is important is that changes in earnings at the non-claim employer during the [temporary income benefits] and [supplemental income benefits] periods can have a big impact on the employee's entitlement to benefits.

Rule 122.5(f) defines the time period, up to the date the claimant reaches MMI, for which any change in employment status or wages at the non-claim employer must be reported to the carrier as it applies to calculating AWW. In Appeals Panel Decision (APD) 151496-s, decided September 30, 2015, the Appeals Panel clarified that Rule 122.5 does not establish a deadline for filing an Employee's Multiple Employment Wage Statement (DWC-3ME).

The ALJ determined the claimant's PIE for each week from January 24, 2017, through August 12, 2017. The ALJ determined the claimant's PIE for August 13, 2017, was $0. The ALJ determined that the claimant's PIE from August 14, 2017, to the date of the June 13, 2018, CCH was also $0.

PIE from January 24, 2017, through August 12, 2017

For the week of January 24, 2017, through January 28, 2017, the ALJ's Finding of Fact No. 17 states that the earnings are based on a computer list of wages earned and not the pay statements.

For the weeks for the period from January 29, 2017, to August 12, 2017, the ALJ states in her discussion that she determined the amount of PIE for each week based on the non-claim employer's pay statements. In evidence are the claimant's pay statements from the non-claim employer, which are broken down into two-week periods. The ALJ notes in her discussion that she "[d]ivided by 2 for weekly PIE" to calculate the amount of PIE from the non-claim employer for each week.

The self-insured states that the ALJ correctly listed the PIE using two-week time periods and using earnings for a two-week period in the discussion portion of the decision; however, the self-insured contends, as mentioned earlier, that the ALJ "appears to have inadvertently copied the dates for two-week time periods but copied the monetary amounts for one week time periods in her [f]indings and [c]onclusions regarding [PIE]."

Finding of Fact No. 16 states, in part, that "[f]or the *each of the week of the following periods*, the PIE rate is. . ." (emphasis added).

Conclusion of Law No. 6, the decision and order section on the first page and the decision section on the last page state, in part, that "[f]or the *each of the two weeks of the following periods*, the PIE rate is. . ." (emphasis added).

The self-insured requests that a clerical correction be issued to clarify the ALJ's determinations regarding the amount of PIE for each week. We agree the ALJ's language referencing "each of the week of the following periods" and "each of the two weeks of the following periods" is inconsistent as to what the amount of PIE is for each week. However, the ALJ's discussion explains that she determined the amount of PIE for each week based on the evidence presented at the CCHs. Given the ALJ's discussion and the evidence presented in support of the ALJ's PIE determination, we affirm, as reformed, the ALJ's decision to clarify the amount of PIE for each week by stating:

For each week of the following periods, the PIE amount from the non-claim employer is:

| | From January 24, 2017, to August 12, 2017 | PIE Amount |
|---|---|---|
| 1 | 01/24/2017 - 01/28/2017 | $417.75 |
| 2 | 01/29/2017 - 02/04/2017 | $607.28 |
| 3 | 02/05/2017 - 02/11/2017 | $607.28 |
| 4 | 02/12/2017 - 02/18/2017 | $641.25 |
| 5 | 02/19/2017 - 02/25/2017 | $641.25 |
| 6 | 02/26/2017 - 03/04/2017 | $659.07 |
| 7 | 03/05/2017 - 03/11/2017 | $659.07 |
| 8 | 03/12/2017 - 03/18/2017 | $685.84 |
| 9 | 03/19/2017 - 03/25/2017 | $685.84 |
| 10 | 03/26/2017 - 04/01/2017 | $741.42 |
| 11 | 04/02/2017 - 04/08/2017 | $741.42 |
| 12 | 04/09/2017 - 04/15/2017 | $630.42 |
| 13 | 04/16/2017 - 04/22/2017 | $630.42 |
| 14 | 04/23/2017 - 04/29/2017 | $673.69 |
| 15 | 04/30/2017 - 05/06/2017 | $673.69 |
| 16 | 05/07/2017 - 05/13/2017 | $669.75 |
| 17 | 05/14/2017 - 05/20/2017 | $669.75 |
| 18 | 05/21/2017 - 05/27/2017 | $623.44 |
| 19 | 05/28/2017 - 06/03/2017 | $623.44 |
| 20 | 06/04/2017 - 06/10/2017 | $540.98 |
| 21 | 06/11/2017 - 06/17/2017 | $540.98 |
| 22 | 06/18/2017 - 06/24/2017 | $497.10 |
| 23 | 06/25/2017 - 07/01/2017 | $497.10 |
| 24 | 07/02/2017 - 07/08/2017 | $585.75 |
| 25 | 07/09/2017 - 07/15/2017 | $585.75 |
| 26 | 07/16/2017 - 07/22/2017 | $585.57 |
| 27 | 07/23/2017 - 07/29/2017 | $585.57 |
| 28 | 07/30/2017 - 08/05/2017 | $531.60 |
| 29 | 08/06/2017 - 08/12/2017 | $531.60 |

PIE from August 13, 2017, to June 13, 2018, date of CCH

The ALJ's Finding of Fact No. 18 states that "[t]here is no evidence of money earned for 08/13/2017" and Finding of Fact No. 19 states that "[t]here was no evidence of the amount of money [the] [c]laimant earned after August 14, 2017."

The claimant asserts on appeal that he continued to work for the non-claim employer as an independent contractor. In evidence are copies of pay statements dated after August 14, 2017 from the non-claim employer; an email from the claimant stating that on December 13, 2017, he received a check from the non-claim employer; and an email from the non-claim employer stating that "after the August 14 termination date, he only worked approx. 15 hours a week (at the most) during September, and less than 10 in the first couple of weeks in October." Given the documentation in evidence, the ALJ's findings of "no evidence" are material misstatements of fact. Accordingly, we reverse that portion of the ALJ's determination that for August 13, 2017, the PIE rate is $0 and from August 14, 2017, through the June 13, 2018, date of CCH, the claimant's weekly PIE rate is $0, and we remand to the ALJ to determine the amount of PIE from August 13, 2017, through the June 13, 2018, date of CCH.

Furthermore, we note that Section 410.203(c) precludes a remand more than once. Given that we are remanding for the ALJ to determine the amount of PIE from August 13, 2017, through the June 13, 2018, date of CCH, we note that the self-insured specifically requests a clerical correction to the ALJ's findings and conclusions to change the amount of PIE, after August 14, 2017, from $0 to $619.51. The self-insured states that the claimant's PIE "from January 24, 2017, through August 12, 2017, was $17,346.26 for 28 weeks, or an average of $619.51 per week." However, Rule 129.2(c) provides what PIE shall include. Although Rule 129.2(c) does not provide an exhaustive list of what PIE shall include, it does provide that PIE is a documented weekly amount. Furthermore, Rule 129.2 does not provide that PIE must be calculated as an average by dividing the amount of earnings from the non-claim employer by the weeks worked by the injured employee.

## SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to a lumbar disc herniation at L5-S1.

We affirm the ALJ's determination that the claimant had no disability resulting from the compensable injury, from June 4, 2017, through the June 13, 2018, date of CCH.

We affirm, as reformed, that portion of the ALJ's determination for each week of the following period, from January 24, 2017, to August 12, 2017, the PIE amount as stated in the table above.

We reverse that portion of the ALJ's determination that for August 13, 2017, the PIE rate is $0 and we reverse that portion of the ALJ's determination that from August 14, 2017, through the June 13, 2018, date of CCH, the claimant's weekly PIE rate is $0, and we remand to the ALJ to make a determination on the issue of the amount of PIE from August 13, 2017, through the June 13, 2018, date of CCH, consistent with this decision.

## REMAND INSTRUCTIONS

On remand the ALJ is to correct her misstatement of the evidence regarding the documentation in evidence. The ALJ shall consider all of the evidence and make a determination as to the amount of PIE for each week for the period from August 13, 2017, through the June 13, 2018, date of CCH.

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 ALJ, 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 Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **STARBUCKS CORPORATION (a certified self-insured)** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY**
**211 EAST 7TH STREET, SUITE 620**
**AUSTIN, TEXAS 78701**.

Veronica L. Ruberto
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge