

APPEAL NO. 200928
FILED JULY 30, 2020

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 May 11, 2020, in (city), Texas, with (Administrative Law Judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that the respondent's (claimant) average weekly wage (AWW) is \$1,210.00. The appellant (carrier) appeals the ALJ's determination of the AWW. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a compensable injury on (date of injury). The claimant testified that she was hired to work as an equine ranch manager for employer on March 11, 2019. The sole issue before the ALJ was the claimant's AWW. The claimant testified that she was paid \$450.00 per week salary and the employer provided housing and utilities and allowed her to board her horses at the ranch. The claimant testified that she left the employer-supplied housing on January 7, 2020, and moved her horses off the property about a week later. There was conflicting evidence about how many of her horses were allowed to board on the property without cost to the claimant as part of her employment compensation package. Additionally, the evidence indicated that the number of horses boarding on the property changed over the term of the claimant's employment.

Section 408.041(a) provides that a full-time employee's AWW shall be determined by dividing the wages from the 13 weeks preceding the compensable injury by 13. See *also* 28 TEX. ADMIN. CODE § 128.3(d) (Rule 128.3(d)). If a full-time employee did not work for the employer for the 13 weeks preceding the compensable injury, the AWW is calculated using "the usual wage that the employer pays a similar employee for similar services" or "if a similar employee does not exist, the usual wage paid in that vicinity for the same or similar services provided for remuneration." Sections 408.041(b)(1) and 408.041(b)(2); Rule 128.3(e). If neither of the foregoing methods can "reasonably be applied," because the employee has lost time from work during the 13-week period immediately preceding the injury because of illness, weather, or another cause beyond the control of the employee, the AWW is determined "by any method" that the Texas Department of Insurance, Division of Workers' Compensation (Division) considers "fair, just, and reasonable to all parties and consistent with the methods established under [the 1989 Act]." Section 408.041(c); Rule 128.3(g).

Section 401.011(43) provides that “wages” includes all forms of remuneration payable for a given period to an employee for personal services, and that 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. Section 408.045 provides that the Division may not include nonpecuniary wages in computing an employee’s AWW during a period in which the employer continues to provide the nonpecuniary wages. Rule 128.1(c)(2) provides, in part, that an employee’s wage, for the purpose of calculating the AWW, shall not include any nonpecuniary wages continued by the employer after the compensable injury. However, except as provided by Rule 128.7 of this title and Section 408.042(e), if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included.

The ALJ stated in her discussion of the evidence that under the facts of this case the AWW should be determined using a fair, just, and reasonable method. The carrier contends that it was error for the ALJ to base her determination of the value of the housing and boarding of horses provided on the fair market value. The Appeals Panel has previously held that the market value of an apartment may be included in calculating the AWW. See Appeals Panel Decision (APD) 042364-s, decided November 17, 2004, and APD 130022, decided March 18, 2013. In this case, the ALJ did not err in using a fair, just, and reasonable method to calculate the AWW.

The ALJ calculated the AWW as follows: wages of \$450.00 per week, \$435.00 per week in housing, and \$325.00 in boarding, for a total of \$1,210.00. The ALJ based her calculations for housing and boarding of the horses by arriving at a monthly amount and dividing by 4. We note that to calculate a weekly amount using this method is not entirely accurate as not every month has exactly 4 weeks.

As stated above, the claimant continued living in the employer-provided housing and using the employer-provided boarding until January 2020. The ALJ failed to take into consideration the specific time periods after the date of injury that the claimant was still receiving the nonpecuniary benefits from the employer of housing and boarding of the claimant’s horses. Accordingly, we reverse the ALJ’s determination that the claimant’s AWW is \$1,210.00 and remand the AWW issue to the ALJ for a determination that is supported by the evidence. The AWW needs to be recalculated to exclude the nonpecuniary benefits for the time periods the benefits of housing and boarding of the claimant’s horses were continuing to be paid to the claimant. The ALJ should make specific findings regarding the number of horses that were boarded as part of her compensation package and the specific time periods such horses were actually being boarded on the employer’s property and recalculate the AWW as supported by 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 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge