

APPEAL NO. 201505
FILED DECEMBER 11, 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 (CCH) was held on September 23, 2020, 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 employer did not make a bona fide offer of employment (BFOE) to the appellant/cross-respondent (claimant), and therefore, the respondent/cross-appellant (carrier) is not entitled to adjust the post-injury earnings; (2) the average weekly wage (AWW) from September 16 through December 1, 2019, is \$1,168.17; (3) the AWW from December 2, 2019, through the date of the CCH is \$1,216.38; (4) the claimant has disability as a result of the compensable injury from May 22, 2020, through the date of the CCH.

The claimant appealed the ALJ's determination of AWW, contending that the ALJ erred in failing to include nonpecuniary wages in the form of housing and utilities in the AWW calculation. The carrier responded, urging affirmance. The carrier cross-appealed the ALJ's determinations regarding BFOE and disability. The claimant responded, urging affirmance of the ALJ's BFOE and disability determinations.

DECISION

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

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury), and that as of December 2, 2019, the adjustment for health insurance premiums for the AWW is \$48.21 per week. The evidence indicated that the claimant was injured when he tripped and fell while walking back to his truck while working.

BFOE

The ALJ's determination that the employer did not make a BFOE to the claimant, and therefore, the carrier is not entitled to adjust the post-injury earnings is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant has disability as a result of the compensable injury from May 22, 2020, through the date of the CCH, is supported by sufficient evidence and is affirmed.

AWW

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)).

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. Rule 126.1(2) states, in part, that nonpecuniary wages are wages paid to an employee in a form other than money. Examples of nonpecuniary wages include rent. Rule 128.1(b) provides, in part, that an employee's wage, for the purpose of calculating the AWW, shall include: (1) all pecuniary wages paid by the employer to the employee; and (2) all nonpecuniary wages paid by the employer to the employee prior to the compensable injury but not continued by the employer after the injury.

The claimant began working for the employer in May 2019, and worked throughout the 13-week period prior to the (date of injury), compensable injury. Therefore, the ALJ calculated the claimant's AWW by dividing the wages from the 13 weeks preceding the compensable injury by 13 as provided for in Section 408.041(a). The ALJ also added the cost of discontinued health care premiums in the amount of \$48.21 per week for the period of December 2, 2019, through the date of the CCH, as stipulated by the parties. The claimant argued that in addition to the health insurance premiums, the nonpecuniary wages of his housing and utilities should be included in the calculation of the AWW.

The claimant leased an apartment in (city), Texas, beginning on August 1, 2018. The employer acquired the apartment building where he was living in January of 2019, before the claimant was hired. When the claimant was hired in May of 2019, the employer allowed the claimant to continue living in his apartment rent-free. The employer additionally took over all the claimant's utility payments. However, at the end of July of 2019, the associate counsel for the employer's holding company informed the claimant that his family members could not continue to live in the apartment with him as it was strictly for employees. At that time, the claimant elected to move due to the fact that he had custody of his minor child. The ALJ stated in her discussion that since the employer stopped paying the claimant's rent and utilities before the date of the (date of injury), compensable injury and the claimant chose to move out, the AWW does not include the cost of rent and utilities. We disagree. The evidence indicates that the claimant lived rent-free during at least a portion of the 13-week period that was used to

calculate his AWW and provided evidence that the value of the apartment was \$825.00 per month. 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 addition to receiving the value of the apartment, the employer paid the claimant's utilities in full during a portion of the 13-week period used to calculate the claimant's AWW. As stated above, 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. We hold that the ALJ erred in failing to consider the value of the apartment and utilities that the claimant received during a portion of the 13-week period in calculating the claimant's AWW. Therefore, the ALJ's determinations that the AWW from September 16 through December 1, 2019, is \$1,168.17 and the AWW from December 2, 2019, through the date of the CCH is \$1,216.38 are reversed. As the ALJ did not make a finding regarding the value and amount of nonpecuniary wages that the claimant received during the 13-week period and the amount is in dispute, we remand the issue of AWW back to the ALJ to determine the claimant's AWW from September 16 through December 1, 2019, and from December 2, 2019, through the date of the CCH in accordance with this decision.

SUMMARY

We affirm the ALJ's determination that the employer did not make a BFOE to the claimant, and therefore, the carrier is not entitled to adjust the post-injury earnings.

We affirm the ALJ's determination that the claimant has disability as a result of the compensable injury from May 22, 2020, through the date of the CCH.

We reverse the ALJ's determinations that the AWW from September 16 through December 1, 2019, is \$1,168.17 and the AWW from December 2, 2019, through the date of the CCH is \$1,216.38, and we remand the issue of AWW back to the ALJ to determine the claimant's AWW from September 16 through December 1, 2019, and from December 2, 2019, through the date of the CCH in accordance with this decision.

REMAND INSTRUCTIONS

On remand, the ALJ should consider the evidence regarding any rent and utilities that the claimant received during any part of the 13-week period used to calculate the AWW. The ALJ is to make specific findings on the value of the nonpecuniary wages that

the claimant received and on which weeks during the 13-week period he received them that are supported by the evidence and consistent with this decision. The ALJ should then make a determination regarding the claimant's complete AWW for the periods of September 16 through December 1, 2019, and from December 2, 2019, through the date of the CCH that is supported by the evidence and consistent with this decision.

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 Texas Department of Insurance, Division of Workers' Compensation 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 **NEW HAMPSHIRE INSURANCE COMPANY** 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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge