

APPEAL NO. 201642
FILED DECEMBER 22, 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 22, 2020, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by determining that: (1) the respondent/cross-appellant (claimant) sustained a compensable injury on (date of injury); and (2) the claimant did not have disability resulting from the (date of injury), compensable injury beginning on April 26, 2020, and continuing through the date of the CCH.

The appellant/cross-respondent (carrier) appealed the ALJ's determination that the claimant sustained a compensable injury on (date of injury), as well as Finding of Fact No. 5, that the "(date of injury), compensable injury was a cause of [the] [c]laimant's inability to perform his preinjury duties from April 26, 2020, through the date of [the CCH]." The claimant responded, urging affirmance of the ALJ's compensability determination and Finding of Fact No. 5 in his favor. The claimant also cross-appealed the ALJ's disability determination adverse to him. The carrier responded to the claimant's cross-appeal, urging affirmance of the disability determination.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified he was injured on (date of injury), while filling a flat tire. The claimant testified that as he was filling the tire it exploded, causing injuries to his left arm which resulted in multiple surgeries.

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).

COMPENSABLE INJURY

The ALJ's determination that the claimant sustained a compensable injury on (date of injury), is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ found that “[t]he (date of injury), compensable injury was a cause of [the] [c]laimant’s inability to perform his preinjury duties from April 26, 2020, through the date of [the CCH].” The ALJ’s finding is supported by the evidence. However, the ALJ determined that the claimant did not have disability beginning on April 26, 2020, through the date of the CCH. The ALJ noted in the Discussion portion of the decision that the claimant testified he has not been able to work since the compensable injury due to the injuries he sustained. The ALJ also stated the following:

[The] [c]laimant testified that [the] [e]mployer has continued to pay [the] [c]laimant his regular weekly wage even though [the] [c]laimant is physically unable to perform his job or earn his pre-injury wage as a result of the compensable injury. [The] [c]laimant has not met his burden of proof that he has disability from April 26, 2020, through the date of this CCH because [the] [e]mployer continued to pay [the] [c]laimant his preinjury wages.

Section 401.011(16) defines disability as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” Section 408.003(f) provides that “[s]alary continuation payments made by an employer for an employee’s disability resulting from a compensable injury shall be considered payment of income benefits for the purpose of determining the accrual date of any subsequent income benefits” under the 1989 Act.

In Appeals Panel Decision (APD) 050565, decided May 2, 2005, the issue was disability. The claimant in that case sustained a compensable injury and was unable to work for a period of time during which he received salary continuation from the employer. The carrier in that case contended that since the claimant received salary continuation during the claimed disability period, he was not entitled to temporary income benefits (TIBs). The Appeals Panel noted that neither the issue of payment of TIBs nor the accrual date of income benefits was before the ALJ or the Appeals Panel, and that the only issue before the Appeals Panel was disability. The Appeals Panel cited APD 951736, decided December 7, 1995, and APD 941073, decided September 26, 1994, as cases in which the claimant continued to receive his salary but did not work because of the compensable injury. The Appeals Panel held in those cases that the claimant had disability because the injured employee “was not performing personal services for the employer in exchange for the salary continuation,” and that the claimant had disability during the period that he was unable to work. In APD 050565, *supra*, the Appeals Panel held that the ALJ erred in determining that the claimant did not have disability because he received salary continuation benefits for a

period of time while he was not working, and therefore reversed the determination and rendered a new decision that the claimant did have disability during such period of time.

In the case on appeal, the only issues before the ALJ were compensability and disability; there was no issue regarding either the payment of TIBs or the accrual date of income benefits. The claimant testified he has been unable to work due to the compensable injury since the date of that injury, and that since the date of injury he has received pay in an amount equal to his preinjury wage. The evidence was undisputed that the claimant did not perform any personal services for the employer in exchange for the pay he received. The ALJ's statement that the claimant did not meet his burden of proof that he had disability from April 26, 2020, through the date of the CCH because the employer continued to pay the claimant his preinjury wages is legally incorrect; the employer's payments to the claimant are not wages under the 1989 Act. We hold the ALJ erred in determining that the claimant did not have disability beginning on April 26, 2020, and continuing through the date of the CCH. Accordingly, we reverse the ALJ's determination that the claimant did not have disability beginning on April 26, 2020, and continuing through the date of the CCH, and we render a new decision that the claimant had disability beginning on April 26, 2020, and continuing through the date of the CCH. We take no position on the accrual of benefits or reimbursement as these issues are not before us.

SUMMARY

We affirm the ALJ's determination that the claimant sustained a compensable injury on (date of injury).

We reverse the ALJ's determination that the claimant did not have disability resulting from the (date of injury), compensable injury beginning on April 26, 2020, and continuing through the date of the CCH, and we render a new decision that the claimant had disability beginning on April 26, 2020, and continuing through the date of the CCH.

The true corporate name of the insurance carrier is **GRAPHIC ARTS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD A. MAYER
11910 GREENVILLE AVENUE, SUITE 600
DALLAS, TEXAS 75243.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Margaret L. Turner
Appeals Judge