

APPEAL NO. 210393  
FILED APRIL 29, 2021

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 February 1, 2021, 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 respondent (claimant) had disability resulting from the compensable injury from September 25, 2020, through the date of the CCH; and (2) the claimant's average weekly wage (AWW) is \$4,920.43. The appellant (carrier) appealed, disputing the ALJ's determination of the AWW and disability. The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant testified that he was injured in a motor vehicle accident while working as a private investigator. The ALJ asked the parties if they could stipulate that the claimant sustained a compensable injury on (date of injury). A decision and order from a prior CCH is in evidence that determined the claimant sustained a compensable injury on (date of injury). The carrier appealed that decision to the Appeals Panel. A written decision by the Appeals Panel on the carrier's appeal was not issued by the 45th day after the response was due or filed with the Texas Department of Insurance, Division of Workers' Compensation (Division); therefore, the ALJ's decision in that case became final and is the final decision of the Appeals Panel pursuant to Section 410.204(c) and 28 TEX. ADMIN. CODE § 143.5(b) (Rule 143.5(b)). The carrier stated that it was unwilling to stipulate that the claimant sustained a compensable injury because the compensability issue was currently in dispute at the district court level. The ALJ stated at the CCH she would make a finding of fact regarding whether the claimant sustained an injury on (date of injury). However, the ALJ included stipulation 1.D. that the parties agreed that the claimant sustained a compensable injury on (date of injury). A review of the record reflects that the carrier did not agree to stipulate that the claimant sustained a compensable injury on (date of injury). Accordingly, we strike Finding of Fact No. 1.D. We note that Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490 (Tex. App.—Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling—whether granting or denying benefits—remains in effect until overturned by a final and enforceable judicial decision.

**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 Rule 128.3(d). Rule 128.1(c) provides, in part, that an employee's wage, for the purpose of calculating the AWW shall not include 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. Rule 128.1(d) provides that the AWW shall be calculated using gross wages.

The claimant testified that he was his own employer. He testified that at times he had others working for him but that he put all of his earnings into one account and paid his "bills" out of the same account. The claimant testified that he did not know what his business expenses were during the 13-week period prior to his injury. The claimant did not testify specifically as to the times others worked for him or whether any of the income reported as earnings was earned by others. In arriving at the claimant's AWW in her decision, the ALJ considered the claimant's business income during the 13-week period preceding the injury and divided that amount by 13. She did not consider expenses incurred by the claimant in relation to his business as part of that determination.

In Appeals Panel Decision (APD) 970578, decided May 15, 1997, the claimant was a truck driver who was paid 22 cents per mile, 7 cents of which was identified as a per diem for travel expenses. The claimant did not have to keep receipts for expenses and he was paid by the mile, no matter how far he had to drive and irrespective of whether the trip required an overnight stay. The Appeals Panel concluded that the ALJ erred in including the 7 cents per mile per diem in the claimant's AWW, reversed the determination of the ALJ that the 7 cents be included in the AWW, and stated:

In this instance, the claimant undeniably incurred travel expenses in the course of performing his duties as a long haul truck driver and the per diem was primarily a payment to defray those costs rather than a payment to provide a financial or economic gain to the claimant for the performance of personal services. Therefore, it is not properly characterized as a form of remuneration under the 1989 Act and the [Division] rules.

In the instant case, the claimant's AWW should be based on his net profits. To disregard his business expenses in calculating his AWW would lead to an unjustifiably inflated AWW figure, a figure far higher than the economic advantage he gained by working. It was error for the ALJ to determine the claimant's AWW without consideration of any business expenses incurred by the claimant during the 13 weeks

used to calculate his AWW. Accordingly, we reverse the ALJ's determination that the claimant's AWW is \$4,920.43 and remand the AWW issue to the ALJ for further action consistent with this decision.

### **DISABILITY**

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." The claimant had the burden of proving disability for any period claimed. See APD 94248, decided April 12, 1994. In APD 000783, decided May 22, 2000, we identified that the claimant has the burden of proof concerning income from a business and stressed the need for the claimant to be forthcoming and accurate with information about self-employment income.

As noted above the AWW issue was reversed and remanded to the ALJ to further consider and develop the evidence to determine the claimant's AWW. The claimant testified that he made some earnings from his business during the disability period in dispute but did not know the amount and could not give an estimate. Accordingly, we reverse the ALJ's determination that the claimant had disability resulting from the compensable injury, from September 25, 2020, through the date of the CCH. We remand the disability issue for further consideration and for such further findings of fact and conclusions of law as may be appropriate.

### **SUMMARY**

We strike Finding of Fact No. 1.D.

We reverse the ALJ's determination that the claimant's AWW is \$4,920.43 and remand the AWW issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant had disability resulting from the compensable injury, from September 25, 2020, through the date of the CCH, and remand the disability issue to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

On remand the ALJ is to make a finding of fact regarding whether the claimant sustained a compensable injury on (date of injury).

On remand the ALJ is to further develop the record and make specific findings regarding the expenses of the claimant's business during the 13-week period immediately prior to the compensable injury. Additionally, the ALJ is to further develop the record and make findings regarding the earnings the claimant had during the

disability period in dispute. The ALJ is to then make a determination of the claimant's AWW and whether the claimant had disability from September 25, 2020, through the date of the CCH 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

**MR. 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