

APPEAL NO. 211214  
FILED SEPTEMBER 30, 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 June 23, 2021, 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 (claimant) had disability from January 18, 2019, to November 3, 2020, resulting from a compensable injury sustained on (date of injury). The appellant (carrier) appeals the ALJ's determination of disability. The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the compensable injury consists of a lumbar sprain, lumbar radiculopathy, and lumbar disc disorder; and (Dr. D) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor for purposes of disability and return to work. We note that in Finding of Fact No. 1.B. the ALJ incorrectly referred to the employer as (employer) rather than (employer) as stipulated to by the parties. Further, we note that the parties stipulated at the CCH as part of Finding of Fact No. 1.F. that Dr. D was also appointed by the Division for the purposes of maximum medical improvement, impairment rating, and extent of injury.

The claimant testified that he was injured when he stepped into a deep hole. At issue was whether the claimant had disability from January 18, 2019, to November 3, 2020. Disability is an economic concept defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. The claimant has the burden to prove that he had disability as defined by Section 401.011(16). Disability is a question of fact to be determined by the ALJ. See Appeals Panel Decision (APD) 142338, decided December 17, 2014. We have often held that a claimant can move in and out of disability. See APD 160131, decided March 30, 2016, and APD 031317, decided June 25, 2003.

The claimant testified that he worked for various employers during the disability time period in dispute. Numerous pay stubs from those employers were in evidence. In her discussion of the evidence, the ALJ noted that the claimant stated that during the period in dispute he was able to earn his pre-injury wage in some weeks. Further, the ALJ, in her discussion of the evidence, stated that the claimant provided paycheck stubs, which, when compared to his pre-injury earnings statement, showed that he

frequently earned less than his pre-injury wages during the disputed period. However, despite her acknowledgement of the evidence that the claimant was able to earn his pre-injury wage for some of the weeks in dispute, the ALJ determined that the claimant had disability for the entire period. When a worker has returned to work after an injury and has earned wages that he contends are less than his prior wage, a determination of the amount of the pre-injury average weekly wage (AWW) is essential to an accurate analysis of the disability issue and is effectively subsumed in that issue. See APD 021051, decided June 20, 2002. The ALJ's determination that the claimant had disability for the entire time period at issue is against the great weight and preponderance of the evidence. Therefore, we reverse the ALJ's determination that the claimant had disability from January 18, 2019, to November 3, 2020, resulting from a compensable injury sustained on (date of injury). We remand the disability issue to the ALJ to make a determination considering the claimant's AWW and the claimant's earnings in each week of the disputed disability period that is supported by the evidence. Further, the ALJ should correct Findings of Fact Nos. 1.B. and 1.F. regarding the correct employer and the reasons the designated doctor was appointed to conform to the actual stipulations of the parties.

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 **LIBERTY MUTUAL FIRE 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.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Cristina Beceiro  
Appeals Judge

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Carisa Space-Beam  
Appeals Judge