

APPEAL NO. 221028
FILED SEPTEMBER 1, 2022

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 January 31, 2022, with the record closing on May 26, 2022, 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 compensable injury of (date of injury), extends to bibasilar atelectasis; (2) the compensable injury of (date of injury), does not extend to C5-6 disc herniation, post cervical decompressive discectomy at C5-6, post cervical arthrodesis at C5-6 with allograft, cervical myelopathy, cervical stenosis, herniated nucleus pulposus at C5-6, gait, neck muscle spasms, C6-7 disc protrusion, L4-5 disc bulge, or an L5-S1 annular tear; (3) the appellant (claimant) reached maximum medical improvement (MMI) on December 4, 2018; (4) the claimant's impairment rating (IR) is zero percent; (5) the claimant had disability from October 24, 2018, through December 15, 2018, as a result of the compensable injury of (date of injury); and (6) the claimant did not have disability from December 16, 2018, through the date of the hearing, as a result of the compensable injury of (date of injury).

The claimant appealed the ALJ's determinations of MMI, IR, average weekly wage (AWW), that portion of the disability determination against him, and that portion of the extent-of-injury determination against him. The claimant also pointed out in his appeal that the ALJ failed to list the issue of AWW or make a conclusion of law on that issue. The respondent (carrier) responded to the claimant's appeal, urging affirmance of the ALJ's determinations.

The ALJ's determinations that the compensable injury of (date of injury), extends to bibasilar atelectasis and the claimant had disability from October 24, 2018, through December 15, 2018, as a result of the compensable injury of (date of injury), were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated, in part, that: (1) on (date of injury), the claimant sustained a compensable injury in the form of a nondisplaced left rib fracture and pulmonary contusion; and (2) the Texas Department of Insurance, Division of Workers' Compensation (Division) selected (Dr. R) as designated doctor to address the date of MMI, IR, and extent of injury. The claimant testified that he was injured on (date of injury), while working as a cell tower technician. He further testified that he had climbed

a 180-foot tower wearing a harness when he fell through a manhole. He stated that he fell about five feet, landing on an iron bar and hitting his head on the way down.

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).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does not extend to C5-6 disc herniation, post cervical decompressive discectomy at C5-6, post cervical arthrodesis at C5-6 with allograft, cervical myelopathy, cervical stenosis, herniated nucleus pulposus at C5-6, gait, neck muscle spasms, C6-7 disc protrusion, L4-5 disc bulge, or an L5-S1 annular tear is supported by sufficient evidence and is affirmed.

MMI

The ALJ's determination that the claimant reached MMI on December 4, 2018, is supported by sufficient evidence and is affirmed.

IR

The ALJ's determination that the claimant's IR is zero percent is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant did not have disability from December 16, 2018, through the date of the hearing, as a result of the compensable injury of (date of injury), is supported by sufficient evidence and is affirmed.

AWW

Section 410.168 provides that an ALJ's decision contain findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. 28 Tex. Admin. Code § 142.16 (Rule 142.16) provides that an ALJ's

decision shall be in writing and include findings of fact, conclusions of law, and a determination of whether benefits are due, and if so, an award of benefits due.

A review of the record indicates that the issue of AWW was a certified issue before the ALJ. However, the issue was not included in the decision of the ALJ. Although we note that the ALJ did include an AWW determination in the summary paragraph at the beginning of her decision, the claimant correctly noted in his appeal that the ALJ failed to make a conclusion of law or a decision on the AWW issue. As that portion of the ALJ's decision is incomplete, we reverse the issue of AWW. The ALJ did make findings of fact that the claimant was a full-time employee for more than 13 consecutive weeks preceding the injury and that the parties did not present the claimant's payroll records for the 13 weeks preceding the injury. The ALJ further found that the wages of a similar employee were not presented by the parties. A review of the record indicates that the claimant submitted bank records to establish the AWW. Finally, the ALJ found that a fair, just, and reasonable method of calculating the claimant's AWW is to divide the total amount of the claimant's wages during his 12 weeks prior to the injury by twelve which resulted in \$1,018.75. These findings are supported by sufficient evidence. Accordingly, we render a new decision to conform to the evidence and the ALJ's findings of fact that the claimant's AWW is \$1,018.75. See Appeals Panel Decision 171072, decided July 31, 2017.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to C5-6 disc herniation, post cervical decompressive discectomy at C5-6, post cervical arthrodesis at C5-6 with allograft, cervical myelopathy, cervical stenosis, herniated nucleus pulposus at C5-6, gait, neck muscle spasms, C6-7 disc protrusion, L4-5 disc bulge, or an L5-S1 annular tear.

We affirm the ALJ's determination that the claimant reached MMI on December 4, 2018.

We affirm the ALJ's determination that the claimant's IR is zero percent.

We affirm the ALJ's determination that the claimant did not have disability from December 16, 2018, through the date of the hearing, as a result of the compensable injury of (date of injury).

We reverse the issue of AWW as incomplete and render a new decision that the claimant's AWW is \$1,018.75.

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.**

Cristina Beceiro
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge