APPEAL NO. 92576

This appeal arises under the Texas Workers' Compensation Commission Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). A contested case hearing was initially convened in (city), Texas on May 26, 1992, by hearing officer (hearing officer). The hearing was recessed until June 19th and thereafter was continued twice. Hearing officer (hearing officer) reconvened the hearing on August 31st and continued it until September 10th, on which date the record was closed. Both parties agreed that (hearing officer) should preside over the hearing.

The issues before the hearing officer were as follows: does the claimant have disability as the claimant's capability to work is in dispute; whether light duty employment was available to the claimant or temporary income benefits were due; whether a bona fide light duty offer was given to the employee and made available.

The hearing officer determined that, pursuant to medical releases and offers of employment made by the employer, the claimant had disability from (date of injury) to November 4, 1991, the date he received a bona fide offer of employment; that he was owed temporary income benefits (TIBs) for that period of time; and that he currently has disability commencing on February 24, 1992. The hearing officer thus ordered the carrier, appellant herein, to pay medical benefits and TIBs in a lump sum to the claimant for the period commencing February 24, 1992, plus interest, and continuing weekly thereafter until the claimant no longer has disability or has reached maximum medical improvement.

The carrier cites as grounds for appeal that the hearing officer's decision and order fails to take into account the finding of fact stating that the claimant was paid TIBs from (date of injury) through December 27, 1991, which includes a period of time after the claimant received a bona fide offer of light duty of employment. The carrier requests that it be given a credit toward the TIBs it was ordered to pay beginning February 24, 1992 for the seven weeks and four days of overpayment it has already paid to the claimant. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer. However, we reform the decision and order to allow the carrier to adjust the lump sum payment of TIBs it has been ordered to pay to account for the amount of earnings imputed to the claimant for the period from November 4, 1991 to February 24, 1992, by virtue of the bona fide offer of employment.

The claimant suffered a compensable injury on (date of injury), while working as a furniture refinisher for the (employer), and has not returned to work since that time. The parties stipulated at the contested case hearing that the carrier paid the claimant TIBs of $179.15 commencing (date of injury), and ending December 27, 1991, and that (Dr. E) provided medical treatment to the claimant from (date of injury), to February 28, 1992.

Dr. E diagnosed claimant with herniated nucleus pulposus and recommended conservative treatment. On July 26, 1991, Dr. E authorized continued physical therapy and wrote, "[claimant] could work, but it would be doing very light duty with essentially no lifting, pushing, or pulling." On August 20th, Dr. E wrote, ". . .we will continue with his stabilization program. At the end of this, he should be able to return to work full-duty. He could continue the light duty as previously outlined." On October 7th, Dr. E stated, "I've told [claimant] that he can return to light duty but apparently this is not available for him. In view of this then, he will be unable to work." On October 29th Dr. E noted that claimant was still having trouble "getting anything greater than 50 lbs" and stated he could return to work "at that level."

The claimant testified that Dr. E told him he could no longer help him because he did not specialize in the treatment of injured backs. The record reflects that Dr. E then referred claimant to Dr. M. David Dennis (Dr. D), who became his second choice of treating doctor.

In the interim, claimant was seen by (Dr. R) at the request of the carrier. On September 12, 1991 Dr. R stated his impression as "lumbosacral strain with no clear objective evidence of a radiculopathy. . .I agree with [Dr. E] that at this point he is capable of returning to work. . .I certainly think he is capable of lifting 50 pounds now and if he can limit his lifting to this for about a month then I think he can do lifting up to 75 pounds after that."

On February 28, 1992, Dr. E in a letter to claimant's employer stated there was some confusion about claimant's return to work status. Dr. E noted that on claimant's last visit (October 29, 1991), he had released him to light duty with no lifting greater than 30 pounds (sic). Dr. E said that somehow the Texas Workers' Compensation Commission, the employer, and the carrier had been of the opinion that claimant had been released to return to full duty. Dr. E said this impression was also confirmed by Dr. D's letter. Dr. E concluded, "For the record, I do not see any significant difference between my diagnosis and [Dr. D's]. . .I think at this point then that in view of the fact that this man is continuing to have difficulty. . .that it would be reasonable to carry out further diagnostic procedures. . .In my opinion then, this man is still able to return to light duty as previously outlined in my notes of October 29, 1991."

On February 24, 1992 Dr. D ordered further radiographic evaluation which he said disclosed a very wide spondylolysis at the L5-S1 level. He recommended pars interarticularis injections to relieve discomfort and refused to release the claimant to regular duty work at that time. On May 18th, Dr. D wrote that the claimant was getting progressively worse and that he may have a small central disc herniation. By office note of June 18th Dr. D stated that as of May 18, 1992, he had placed claimant on off work status. Following completion of the pars injections, Dr. D said he would make further recommendations as to claimant's work status.

Sworn affidavits of claimant's supervisor and employer's personnel director were admitted into evidence. The personnel director, (Ms. S), stated that in November 1991, claimant spoke with his supervisor, (Mr. M), about a light duty position and was told by Mr. M that such a position was available. Ms. S sent claimant a follow-up letter the same day confirming that light duty, within the limits set by claimant's doctor, was available. On November 4th, claimant called his supervisor's office to state he would be unable to do light duty work because his back was hurting. Ms. S also said that on December 9, 1991, another letter was mailed to claimant telling him that the light duty position offered in November was still available. On December 10th claimant called and stated he was still unable to perform light duty. Mr. M's affidavit said he spoke to claimant on two different occasions after receiving information that he could do light duty work. During the first conversation he said claimant stated he would speak to his doctor about returning to work. On the second occasion, Mr. M said claimant stated he would return to work the following Monday but that he never showed up. Two letters from employer, dated November 1, 1991, and December 9, 1991, were admitted into evidence. The November 1st letter notes awareness of claimant's lifting limitations and offers a light duty position beginning on November 4th.

The hearing officer found, among other things, that Dr. E released claimant to light duty work on July 26, 1991, which release was effective until February 28, 1992; that Dr. D on February 24, 1992 stated claimant could not return to work and has not released the claimant; and that the claimant received a bona fide offer of employment on November 4, 1991. The hearing officer concluded that claimant had disability--and was owed TIBs--from (date of injury) to November 4, 1991; and that the claimant has disability commencing February 24, 1992. As the hearing officer also found, the carrier paid TIBs until December 27, 1991, which is seven weeks and four days after November 4th. Carrier's sole objection on appeal was the fact that the hearing officer, in ordering that TIBs be paid lump sum from February 24, 1992 until claimant no longer has disability or has reached maximum medical improvement, did not give the carrier credit for the overpayment.

The 1989 Act provides that a claimant is entitled to TIBs so long as he has disability or until maximum medical improvement is reached. The latter was not an issue at this hearing. "Disability" is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). However, the amount of TIBs paid during a period of disability is directly affected by a bona fide offer of employment; Article 8308-4.23(f) provides that if an employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equivalent to the weekly wage for the position offered to the employee.

The Appeals Panel has previously addressed the issue of credit where a carrier has overpaid TIBs. In Texas Workers' Compensation Commission Appeal No. 92291, decided

August 17, 1992, a carrier mistakenly overpaid TIBs when wages of concurrent employers were combined. The carrier sought to offset the excess benefits against current income benefit payments. The panel in that case analyzed the 1989 Act and concluded that it provides certain limited areas for reimbursement or recoupment only where based on fraud, employer payments, erroneous order of the Texas Workers' Compensation Commission, or application of the employee followed by Commission order.

We find that this case is distinguishable from Appeal No. 92291, which involved a carrier's miscalculation and a lack of statutory authority to order a correction. As noted earlier, Article 8308-4.23(f) essentially provides that if there is a bona fide offer of employment, the employee's weekly earnings after the injury are deemed to be the weekly wage for the offered position. Thus, that provision allows TIBs to be adjusted by the amount of an employee's weekly earnings after the injury or by the amount of a wage to be paid for working at the position. Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. *See also* Rule 129.4, which provides that the insurance carrier shall adjust the weekly amount of TIBs paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury. Where an employee does not accept what may later be determined to be a bona fide offer of employment, the effect of the statutory provision and the rule is that the wages the position would have paid are imputed to the employee. If that amount is less than the preinjury wage, the carrier is liable to pay TIBs only on the difference between the two amounts. However, if the amount is equal to the preinjury wage, the carrier would not be liable for TIBs during the period of time the wages were imputed to the employee.

In the instant case, the carrier suspended payment of TIBs on December 27, 1991, apparently based upon claimant's release to light duty work. We note in passing that we have previously held that even an unrestricted, full release to work is not grounds for a carrier to unilaterally suspend TIBs. Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. Rather, this panel has held that expeditious action in the dispute resolution process, where all sides can be heard and all evidence considered, is what is contemplated by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92049, decided March 16, 1992. (That decision also stated that the panel was not unmindful of the provisions of Article 8308-5.23 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.4 (Texas Workers' Compensation Commission Rule 124.4), which provide for 10 days' notice to the Commission whenever compensation is terminated or reduced and provides for an administrative violation if the grounds are determined not to be reasonable.) However, we held it is appropriate, and generally advisable, to seek a benefit review conference and an interlocutory order to terminate compensation. In the instant case, the record reflects that the benefit review conference was held on March 27, 1992. It does not appear that an interlocutory order either suspending TIBs or ordering that TIBs continue was entered.

We are not called upon here to decide whether carrier's suspension of TIBs was improper. The hearing officer held that on November 4, 1991 claimant was extended a

bona fide offer of employment pursuant to Rule 129.5, and that conclusion has not been appealed. Under the facts before us, we hold that under Article 8308-4.23(f) and Rule 129.4(a), the carrier is entitled to adjust the lump sum amount of TIBs owed to claimant, for the period commencing February 24, 1992, to take into account the difference between claimant's imputed amount of wages and the sums actually paid by the carrier during the period November 4, 1991 to February 24, 1992, and the hearing officer's decision and order is reformed to reflect this. In all other aspects, the decision and order of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge