

## APPEAL NO. 93678

On June 25, 1993, a contested case hearing was held in (city), Texas, with (hearing officer)I presiding as the hearing officer. The issue at the hearing was: "What is the correct date of maximum medical improvement (MMI)?" This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act) (formerly Article 8308-1.01 *et seq.*) The appellant (claimant) was injured at work on (date of injury), and disability began on February 3, 1991. He has not been certified as having reached MMI by a doctor. The hearing officer determined that the claimant reached statutory MMI on January 30, 1993, which date the hearing officer determined was the date upon which 104 weeks expired after February 3, 1991, the beginning date of disability. The hearing officer decided that beginning January 31, 1993, the claimant was no longer entitled to temporary income benefits (TIBS), and his entitlement to impairment income benefits (IIBS) began. The claimant contends that the hearing officer erred in concluding that he reached statutory MMI on January 30, 1993, and in concluding that beginning January 31, 1993, he was no longer entitled to TIBS. The claimant asserts that the accrual date for TIBS was February 10, 1991, which was his eighth day of disability, thus he was entitled to TIBS until February 7, 1993, which date he contends was 104 weeks from the date TIBS began to accrue. The respondent (carrier) responds that the hearing officer's decision is correct.

### DECISION

The decision of the hearing officer is reversed and a decision is rendered that the claimant's income benefits began to accrue on his eighth day of disability, which the parties stipulated was February 10, 1991, and that he reached MMI under Sec. 401.011(30)(B) (formerly Article 8308-1.03(32)(B)) upon the expiration of 104 weeks from that date.

Section 401.011(30) of the 1989 Act (formerly Article 8308-1.03(32)) provides as follows:

"Maximum medical improvement" means the earlier of:

- (a)the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or
- (b)the expiration of 104 weeks from the date on which income benefits begin to accrue.

In this case, the claimant was injured at work on (date of injury), he has had three operations, and he has never been certified as having reached MMI. It is undisputed that the claimant has reached MMI under Sec. 401.011(30)(B); however, the parties disagree as to the date on which MMI was reached. The claimant contends that income benefits began to accrue on the eighth day of disability, February 10, 1991, and that the expiration of 104 weeks from that date was February 7, 1993. The carrier contends that since the claimant's

disability continued for four or more weeks, income benefits began to accrue from the beginning date of disability, February 3, 1991, and that the expiration of 104 weeks from that date was January 30, 1993. The hearing officer agreed with the carrier's position and found that the claimant reached MMI on January 30, 1993.

Pertinent stipulations of the parties are as follows:

3. On (date of injury), the claimant sustained a compensable injury while in the course and scope of his employment with (employer);
4. The first day the claimant sustained disability in this case was February 3, 1991;
5. The eighth day of disability herein was February 10, 1991; and
6. The claimant had disability as a result of his compensable injury from at least February 3, 1991 to October 10, 1992 [the decision recites the date of October 3, 1992; however, the record reflects the parties stipulated to the date of October 10th], and from November 24, 1992 through February 10, 1993.

In determining the issue presented, which we believe to be: what is the date income benefits began to accrue in this case, we review pertinent statutory and rule provisions. Section 408.101(a) (formerly Article 8308-4.23(a)) provides that:

Temporary Income Benefits. (a) An employee is entitled to temporary income benefits if the employee has a disability and has not attained maximum medical improvement. [Note that prior to codification of the 1989 Act in the Labor Code, Article 8308-4.23(a) contained the sentence "[t]hese benefits accrue beginning on the eighth day of disability and shall be paid weekly." That sentence is not found in Section 408.101(a) nor, as far as we can determine, is it in Subchapter F relating to TIBS. We observe that Sec. 1.001 of the Texas Labor Code states to the effect that the statutory revision program contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change.]

Section 408.082 (formerly Article 8308-4.22) provides that:

- Accrual of Right to Income Benefits. (a) Income benefits may not be paid under this subtitle for an injury that does not result in disability for at least one week.
- (b) If the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury. If the disability

does not begin at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits accrue on the eighth day after the date on which the disability began.

- (c) If the disability continues for four weeks or longer after the date it begins, compensation shall be computed from the date the disability begins.
- (d) This section does not preclude the recovery of medical benefits as provided in Subchapter B.

Section 402.061 (formerly Article 8308-2.09(a)) provides that the Commission shall adopt rules as necessary for the implementation and enforcement of this subtitle.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 130.4(a) (Rule 130.4(a)) relating to presumption of MMI provides that:

- (a) If 104 weeks have passed since the date that temporary income benefits began to accrue, maximum medical improvement has, by definition, been reached and this section does not apply.

Rule 124.7 relating to the initial payment of TIBS provides that:

- (a) As used in this section, the following terms have the following meanings, unless the context clearly indicates otherwise: *Accrual date* means the day an injured worker's income benefits begin to accrue. *Day of disability* means a day when the worker is unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Intermittent days of disability shall be cumulated to calculate the accrual date.
- (b) An injured worker's accrual date is the worker's eighth day of disability.
- (c) A carrier who has received written notice of an injury and has not disputed the claim in accordance with Sec. 124.6 of this title (relating to Notice of Refused or Disputed Claim) shall initiate income benefits no later than the seventh day after the accrual date.
- (d) Nothing in this section is intended to limit a carrier's discretion to initiate payment of temporary income benefits before the time limit established in subsection (c) of this section.

Rule 129.3 relating to information included with the first payment of TIBS provides

that the insurance carrier shall enclose with the first payment a notice to the employee on a form prescribed by the commission which notice states, among other things:

(5)that entitlement to temporary income benefits continues only until the employee has reached maximum medical improvement, or until 104 weeks have elapsed from the beginning date of disability, at which time other benefits may be available.

TWCC Advisory 93-01, dated January 11, 1993, relates to statutory MMI at 104 weeks and provides in part that:

A claimant, by definition, reaches maximum medical improvement on the day after the expiration of 104 weeks from the date income benefits began to accrue. The claimant's eligibility for temporary income benefits ends at this point and eligibility for impairment income benefits begins.

TWCC Advisory 93-03, dated March 9, 1993, relates to "Maximum Medical Improvement, Accrual Date" and provides that:

Article 8308-1.03(32) [now Section 401.011(30) of the Texas Labor Code] provides that the statutory MMI determination occurs at "the expiration of 104 weeks from the date income benefits begin to accrue." As provided by Rule 124.7(b), an injured worker's accrual date is the worker's eighth day of disability.

In essence, the claimant urges that the 1989 Act and Commission rules provides for one accrual date for income benefits, that being the eighth day of disability, and the fact that a carrier must pay compensation from the beginning date of disability where the disability continues for four weeks or longer does not change the accrual date. On the other hand, the carrier urges that the 1989 Act establishes two different classifications of "compensable events." For the first classification, income benefits accrue on the eighth day of disability. However, for those cases in which disability exceeds four weeks, compensation is computed from the beginning date of disability, and therefore income benefits "accrue" on the beginning date of disability itself.

Having reviewed the record, the arguments of the parties, and the applicable provisions of the 1989 Act and Commission Rules, it is our opinion that there is but one accrual date for income benefits, that being the eighth day of disability. While we acknowledge that Sec. 408.082(c) (formerly Article 8308-4.22(c)) might be interpreted to provide for an accrual date for income benefits on the date disability began where the disability continues for four weeks or longer, such an interpretation is not compelled in light of the fact that the legislature did not specifically state such in that section. The

Commission has the authority to adopt rules for the implementation and enforcement of the 1989 Act. In Rule 124.7 the Commission specifically defined the term "accrual date" to mean the day an injured worker's income benefits begin to accrue, and the Commission determined that an injured worker's accrual date is the worker's eighth day of disability. In our opinion, Rule 124.7 takes precedence over the language of Rule 129.3(5) because Rule 124.7 specifically defines terms and states when an injured worker's income benefits begin to accrue whereas Rule 129.3(5) merely states what information shall be set forth in a notice to the claimant with the first payment of TIBS. What is to be set forth in the notice cannot, in our opinion, change the substantive provisions of Rule 124.7. Our decision that income benefits begin to accrue on the eighth day of disability, even in cases where the claimant's disability continues for four weeks or longer, is supported by Rule 124.7 as that Rule interprets the provisions of Section 408.082 relating to the accrual of right to income benefits and is further supported by TWCC Advisory Opinion 93-03. We do not view either Rule 124.7 or TWCC Advisory Opinion 93-03 as being inconsistent with the 1989 Act's provisions regarding accrual of right to income benefits. Furthermore, our decision in this case in regard to the accrual date for income benefits does not in any way relieve the carrier from its obligation to compute compensation from the date disability begins where disability continues for four weeks or longer. This payment of benefits is simply referred to as a "retroactive payment" in Montford, Barber, and Duncan, A Guide to Texas Workers' Comp Reform, Vol 1, Sec. 4B.22, p. 4.87 (Butterworth Legal Publications 1991).

The carrier urges that its interpretation of the 1989 Act is supported by our decision in Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. In Appeal No. 91014 we were confronted with several issues, including the issue of whether a full release to return to work was a certification of MMI. We determined that it was not. Although the issue of statutory MMI was not before us (the claimant was injured on (date of injury)) in that case, we nevertheless stated that:

We find that the hearing officer did err in determining that the eligibility period for TIBS's continued until claimant reached MMI on December 31, 1993. Rule 130.4(a) states that if 104 weeks have passed since the date that TIB's began to accrue, MMI has, by definition, been reached. One hundred four (104) weeks from January 3, 1991 (the date TIB's began to accrue in this case) would be January 2, 1993.

We find that the above language is dicta and not controlling insofar as it relates to any determination of when income benefits begin to accrue for the purpose of determining the date of statutory MMI inasmuch as the issue of statutory MMI was not squarely before us in that case. Statutory MMI could not have been before us because the claimant was injured on (date of injury) and our decision is dated September 20, 1991, which is nowhere near the 104 week requirement for statutory MMI. In regard to the issue of MMI, the case concerned the requirements for a certification of MMI. What we were obviously attempting to

accomplish was to correct the hearing officer's decision which indicated that TIBS were due for a three year period.

The carrier also cites us to Nations and Kilpatrick, Texas Workers' Compensation Law, A Guide to Practice Before Commission & Court (Matthew Bender 1993), Sec. 20.21[3]. In the referenced treatise, the authors state that "[i]f the disability lasts four weeks or longer, the eight-day accrual period is dispensed with. In such cases, income benefits accrue on the date of the disability itself [R.C.S. Art. 8308-4.22(c)]." While the authors of the treatise are certainly entitled to their opinion, and while we have in this decision acknowledged that such an interpretation might be given to Sec. 408.082(c) (formerly Article 8308-4.22(c)), the authors apparently did not take into consideration Rule 124.7 in reaching their conclusion on this matter. The treatise is enlightening but not, in our opinion, persuasive on the issue at hand.

The decision of the hearing officer is reversed and a decision is rendered that the claimant's income benefits began to accrue on February 10, 1991, that 104 weeks from that date expired on February 7, 1993, and that the claimant reached MMI on February 8, 1993.

---

Robert W. Potts  
Appeals Judge

CONCUR:

---

Joe Sebesta  
Appeals Judge

---

Gary L. Kilgore  
Appeals Judge