

APPEAL NO. 93795

This appeal arises under the Texas Workers' Compensation Commission Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq.*). On July 13, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be decided at the CCH was: What is the temporary income benefits (TIBS) rate for claimant under Article 8308-4.23 (since codified as Section 408.103). The hearing officer determined that the respondent, claimant, is entitled to TIBS payments at the rate of \$90.68 per week for 25 weeks and six days and at the rate of \$84.64 per week thereafter. Appellant, carrier herein, contends that the hearing officer misapplied the law, and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is reversed and we render a new decision that claimant is entitled to TIBS at the rate of \$84.64 per week.

No witnesses were called and the issue was litigated as a matter of law based on certain stipulations. It was stipulated that claimant suffered a work-related injury on (date of injury), for which she received medical benefits and TIBS; that claimant's average weekly wage (AWW) is \$120.91; that the year before her (date of injury), date of accident, claimant earned \$2,354.57 based on the third and fourth quarters of 1990 and the first and second quarters of 1991, as reflected by the Texas Employment Commission (TEC) records; and that claimant had disability from the date of injury until statutory maximum medical improvement (MMI) was reached, 104 weeks after income benefits began to accrue.

The hearing officer found that claimant earned less than \$8.50 per hour, her AWW is (was) \$120.91, and that she earned \$2,354.57 the year prior to the date of the injury. The hearing officer rejected carrier's theory on how TIBS were to be computed, stated that he does ". . . not agree that even Rule 129.2 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 129.2) is entirely correct . . ." and stated in his opinion "the statute (1989 Act) should be interpreted to give the claimant the highest payments of TIBS possible." Consequently, the hearing officer interpreted Article 8308-4.23(d) (Section 408.103) and determined that the claimant was entitled to 75% of her AWW ($.75 \times \$120.91 = \90.68) for the first 25 weeks and six days of disability and 70% of her AWW ($.70 \times \$120.91 = \84.64) thereafter until 104 weeks had been reached. The carrier appealed contending the hearing officer erred in stating that ". . . the law should be liberally construed in favor of the claimant . . ." and that the hearing officer erred in interpreting Section 408.103 (formerly Article 8308-4.23(c), (d), (e) and (f) of the 1989 Act) and by implication Rule 129.2.

Section 408.103 states:

Sec. 408.103. AMOUNT OF TEMPORARY INCOME BENEFITS. (a) Subject to Sections 408.061 and 408.062 (formerly Articles 8308-4.11 and 4.12), the

amount of a temporary income benefit is equal to:

- (1) 70 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's [AWW]; or
 - (2) for the first 26 weeks, 75 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's [AWW] if the employee earns less than \$8.50 an hour.
- (b) A temporary income benefit under Subsection (a)(2) may not exceed the employee's actual earnings for the previous year. It is presumed that the employee's actual earnings for the previous year are equal to:
- (1) the sum of the employee's wages as reported in the most recent four quarterly wage reports to the [TEC] divided by 52;
 - (2) the employee's wages in the single quarter of the most recent four quarters in which the employee's earnings were highest, divided by 13, if the commission finds that the employee's most recent four quarters' earnings reported in the [TEC] wage reports are not representative of the employee's usual earnings; or
 - (3) the amount the commission determines from other credible evidence to be the actual earnings for the previous year if the [TEC] does not have a wage report reflecting at least one quarter's earnings because the employee worked outside the state during the previous year.
- (c) A presumption under Subsection (b) may be rebutted by other credible evidence of the employee's actual earnings.

The above quoted section of the 1989 Act is implemented by Rule 129.2, which states:

Rule 129.2: Calculation of Temporary Income Benefit for Employees Who Earn Less Than \$8.50 Per Hour

- (a) An employee who earns less than \$8.50 per hour shall have [TIBS] for the first 26 weeks of entitlement computed as follows:
- (1) calculate the injured employee's benefits at 70% of the difference between the employee's [AWW] and the employee's weekly earnings after

the injury, and set aside the result;

- (2) then, calculate benefits for the injured employee at 75% of the difference between the employee's [AWW] and the employee's weekly earnings after the injury;
 - (3) next, calculate the employee's actual average weekly earnings for the previous year, under the method described in the Texas Workers' Compensation Act, § 4.23(d);
 - (4) compare the results of paragraphs (2) and (3) of this subsection, and select the lower number;
 - (5) next, compare the number selected in paragraph (4) of this subsection with the result of paragraph (1) of this subsection, and select the higher number; and
 - (6) finally, compare the number found in paragraph (5) of this subsection with the minimum weekly benefit, in effect on the date of injury, under the Act, § 4.12. The higher number is the weekly [TIBS] for the injured employee, not to exceed the maximum weekly benefit in effect on the date of the injury under the Act, § 4.11.
- (b) After the 26th week of eligibility until the end of the [TIBS] period, benefits for the injured employee shall be paid at the rate of 70% of the difference between the [AWW] and the employee's weekly earnings after the injury.

We believe Rule 129.2 is consistent with both the letter and spirit of Section 408.103. We do note there is a slight difference between the former Article 8308-4.23(d) and since codified Section 408.103, in that 4.23(d) simply states: "The weekly [TIBS] under this subsection may not exceed 100 percent of the employee's actual earnings for the previous year." Section 408.103(b), quoted above, makes clear that the TIBS under Subsection (a)(2), which is the section permitting 75% of the AWW for the first 26 weeks for employees earning less than \$8.50, is modified by Section 408.103(b) insofar as they exceed the employee's actual earnings for the previous year. In other words, Section 408.103(b) serves as a disqualifier if 75% of the AWW would result in the excess of the employee's actual earnings the previous year. We would also note that the entire section is "[s]ubject to Sections 408.061 (maximum weekly income benefits) and 408.062 (minimum weekly income benefits)." Consequently, we interpret this as meaning the employee can never draw less than the minimum weekly income benefits under Section 408.062.

Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991, involved a similar situation (having several other distinguishing factual issues) involving the computation of TIBS under the former Article 8308-4.23(d) and Rule 129.2. Although the argument, made by carrier in the instant case, that Article 8308-4.23(d) precludes paying claimant more than 100 percent of the employee's actual earnings for the previous year was not made as forcefully in Appeal No. 91014, *supra*, the manner of computation using the Rule 129.2 formula was followed and found to be correct.

Following the formula of Rule 129.2 results in the following calculations:

(a)

(1) is $.70$ of $(\$120.91 - 0) = \84.64

(2) is $.75$ of $(\$120.91 - 0) = \90.68

(3) is $\$2,354.57 \div 52 = \45.28

(4) is the lower of (2) or (3) or $\$45.28$

(5) is the higher of (1) or (4) or $\$84.64$

(6) The figure in (5) ($\$84.64$) is neither less than the minimum weekly benefit in § 4.12 nor more than the maximum weekly benefit in § 4.11.

In submitting Rule 129.2 for comment prior to implementation, one commentator suggested elimination of the steps in subsection (a)(1) and (6). The Texas Workers' Compensation Commission (Commission) disagreed, stating "the section plainly and clearly spells out the steps that should be followed in a way that the statute does not. Moreover, the section resolves ambiguity in the [1989] Act that could result in artificially lower benefits for low income workers by providing a default to the 70% rate of benefits. The Commission believes that the section will reduce inaccuracy in the calculation of [TIBS]." 16 Tex. Reg. 123 (January 8, 1991). We believe this case to be such an instance and the Commission clearly, both by the terms of Rule 129.2 and by the comment in the rule history, intended to provide a minimum of the 70% rate of the AWW. The rule also has the effect of implementing the 100% of the annual wage limitation if the 75% would exceed the actual earnings for the previous year. The hearing officer was not at liberty to ignore a duly promulgated rule of the agency, and was bound by it. Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2nd 73 (Tex. 1939).

Accordingly, we reverse the hearing officer's decision and render a new decision that the TIBS rate for claimant, pursuant to Section 408.103 and Rule 129.2, is $\$84.64$ a week and that since payment of 75% of the AWW would result in TIBS exceeding the claimant's

actual earnings for the prior year, it is improper to pay claimant \$90.68 for 26 weeks or any part thereof. Accrued but unpaid TIBS are to be paid in accordance with the 1989 Act and Commission Rules.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge