

## APPEAL NO. 93862

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 June 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be decided at the hearing was: What is the temporary income benefits (TIBS) rate for claimant LL under Article 8308-4.23 (since codified as Section 408.103). Two other issues reported from the benefit review conference were severed by agreement of the parties and were not considered at this hearing.

The hearing officer determined that the claimant is entitled to TIBS payments at the rate of \$142.50 for the first 26 weeks following his injury, and at the rate of \$133.00 per week thereafter, so long as the claimant had disability and had not reached maximum medical improvement (MMI). The claimant was injured on (date of injury), while employed by Labor Force, a temporary employment service.

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 that would limit claimant's total benefits to the amount of money he earned in the 12 months prior to his injury. Claimant responds that the decision is supported by the law and the evidence and requests that we affirm the decision, and also argues that the carrier's appeal was untimely.

## 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 \$133.00 per week, according to the rules of the Texas Workers' Compensation Commission (Commission). Although the decision of the hearing officer indicated that she correctly determined to apply the statute and rule as interpreted by the Commission, she erred in that she failed to fully implement the steps of the applicable rule, Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2) as to calculation of the weekly benefit due.

Claimant testified that he was injured (date of injury), while employed by employer and stationed at the location of (employer), where he had worked about four weeks prior to his injury. The nature of the injury was not specified on the record; according to the claimant's testimony, he began to experience a condition, about three months after the injury, whereby the upper layers of his skin peel away from his fingers, leaving them sore. The claimant testified that the cause of this condition was not known to his physician, but that claimant had never experienced it prior to his injury. He is unable to work as a result.

The hearing officer found that claimant earned \$4.75 per hour, and that his average weekly wage (AWW) was \$190.00. He worked for less than 13 weeks for the employer prior to his date of injury. (A wage statement submitted for a "similar employee" included time periods following the claimant's date of injury; thus, the hearing officer used a "fair, just and reasonable" calculation). During some of the period of time in the 12 months prior to

his injury, the claimant was a student. The hearing officer determined that, according to records from the Texas Employment Commission (TEC), the claimant earned \$2755.15 during the twelve months prior to his date of injury.

The hearing officer interpreted Article 8308-4.23(d) (now Section 408.103) and determined that the claimant was entitled to 75% of his AWW ( $0.75 \times \$190.00 = \$142.50$ ) for the first 26 weeks of disability and 70% of his AWW ( $0.70 \times \$190.00 = \$133.00$ ) thereafter until disability ends or MMI is reached.

### **ARGUMENT THAT CARRIER'S APPEAL WAS UNTIMELY**

The carrier's appeal is timely filed. A party that wishes to do so has fifteen days to appeal a decision from the date it is received from the Division of Hearings. The claimant urges that this date was August 12, 1993, according to the date stamp on the hearing officer's decision, but this was the date that the decision was received by the Division of Hearings for distribution to the parties. The Division of Hearings, according to Commission records, did not deliver the decision to the parties until September 13, 1993. The carrier received its copy of the decision on September 17, 1993, and filed its appeal within fifteen days of that date.

### **ARGUMENT THAT THE HEARING OFFICER INCORRECTLY COMPUTED CLAIMANT'S TIBS RATE**

The carrier argues that for workers who earned less than \$8.50 per hour at the time of injury, the legislature has directed that the amount of total TIBs paid to those workers cannot exceed their total earnings for the previous twelve months.

Section 408.103 states:

Section 408.103. AMOUNT OF TEMPORARY INCOME BENEFITS.

(a) Subject to Sections 408.061 and 408.062<sup>1</sup>, 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 average weekly wage; 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 average weekly wage if the employee earns less than \$8.50 an hour.

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<sup>1</sup> Formerly Articles 8308-4.11 and 8308-4.12.

(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 Texas Employment Commission 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 Texas Employment Commission 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 Texas Employment Commission 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<sup>2</sup>.

This 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 average weekly wage 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 average weekly wage and the employee's

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<sup>2</sup>We note that the four quarters of earnings reflected in the TEC statement vary widely, and claimant testified that he was a full-time student during some of the period in question. The hearing officer could have taken the earnings in the highest quarter, \$1498.75, and from that derived average weekly earnings of \$115.23, instead of the \$53.37 she actually used. The result doesn't change in this case, although the alternative available to the Commission, and presumably the court, could raise the amount of the "ceiling" that the carrier argues is imposed by this statute.

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 average weekly wage and the employee's weekly earnings after the injury.

The carrier argues that it was "legislative intent" to correct abuses under the Act, one of which is described by the carrier as "that a low wage-earning claimant could argue that they were totally and permanently disabled after a minor accident simply because they had little or no education. They could continue to work at their previous job but nevertheless receive 401 weeks of benefits because they suffered a diminution in their loss of wage earning capacity." Leaving aside the lack of any citation for such legislative intent, this argument is premised on concepts that have been done away with altogether by the 1989 Act. The payment of temporary income benefits in the 1989 Act (the sole benefit affected by the 12 month "ceiling") is based upon the existence of disability,<sup>3</sup> not loss of earning capacity. The carrier's argument also does not address the interpretation of the statute promulgated by the Commission through Rule 129.2.

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<sup>3</sup>As defined in Section 401.011(16)

Claimant's response correctly points out that the interpretation of the statute urged by carrier would lead to the irrational result that two persons who were substantially similarly situated with respect to not having worked the previous year could be treated differently based upon a penny per hour difference in earnings. We agree with the claimant's argument that this is not the way in which this agency has interpreted the statute.

We believe instead that Rule 129.2 is consistent with both the letter and spirit of Section 408.103.

Texas Workers' Compensation Commission Appeal No. 93795, decided October 20, 1993, is directly on point and has interpreted the statute, as follows:

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)."

When we apply the formula of Rule 129.2(a) to the fact situation in this case, the results are as follows:

(1)the figure under this subsection is 70% of \$190.00 = \$133.00

(2)is 75% of \$190.00 = \$142.50

(3)the average weekly earnings for the previous year is \$2,755.15 divided by 52=  
\$53.37

(4)take the lower of \$142.50 and \$53.37, which is \$53.37

(5)take the higher of \$133.00 and \$53.37, which is \$133.00

(6)The figure derived in (5) (\$133.00) is more than the minimum weekly benefit in Article 8308-4.12 (Section 408.062), which was \$68.00.

When Rule 129.2 was submitted in proposed form for public comment prior to implementation, one commentor 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 Texas Register* 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 annual wage limitation if the 75% would exceed the actual earnings for the previous year. An agency is generally bound by a duly promulgated rule of the agency. Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2d 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 \$133.00 a week. Accrued but unpaid TIBS are to be paid in accordance with the 1989 Act and Commission Rules.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Joe Sebesta  
Appeals Judge