

APPEAL NO. 091807
FILED JANUARY 29, 2010

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) on remand was held on October 8, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the respondent (claimant) sustained disability resulting from the compensable injury from July 23 through December 8, 2008; (2) the post-injury earnings available based on the bona fide offer of employment (BFOE) are \$440.00 per week; and (3) the claimant is entitled to partial temporary income benefits (TIBs) in the amount of \$5,033.96.

The appellant (carrier) appealed, disputing the hearing officer's determinations of disability and the amount of partial TIBs. The appeal file does not contain a response from the claimant. The hearing officer's determination that the post-injury earnings available based on the BFOE are \$440.00 per week (\$11/hour) was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

A CCH was initially held on April 20, 2009, to decide the disputed issues. In Appeals Panel Decision 091025, decided September 3, 2009, the case was remanded for reconstruction of the record. The claimant did not appear at the CCH on remand and a 10-day letter was sent to the claimant at his last known address. The claimant failed to respond to the 10-day letter and the hearing officer closed the record on October 21, 2009. The hearing officer found that the claimant did not have good cause for failing to appear at the CCH.

At the CCH held on April 20, 2009, the parties stipulated that the claimant sustained a compensable injury on _____, and that the claimant's average weekly wage (AWW) is \$677.38. Those stipulations were carried forward in the October 8, 2009, CCH.

DISABILITY

The hearing officer's determination that the claimant sustained disability resulting from the compensable injury from July 23 through December 8, 2008, is supported by sufficient evidence and is affirmed.

TEMPORARY INCOME BENEFITS

Section 408.103(a)(1) provides that subject to Sections 408.061 and 408.062 (the maximum and minimum TIBs rates), the amount of a temporary income benefit is

equal to 70% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's AWW. 28 TEX. ADMIN. CODE § 129.3(d) (Rule 129.3(d)) provides that the carrier shall calculate the employee's lost wages by subtracting post-injury earnings from the AWW. Rule 129.4(a) 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.

As previously noted, the hearing officer's determination that the claimant had disability from July 23 through December 8, 2008, is affirmed. The claimant had disability for a period of 19 weeks and five days. The claimant was paid weekly. In evidence is the wage information for the claimant for the week beginning July 23 through the week ending December 9, 2008, with the exception of 1 week, from November 19 through November 25, 2008. However, there is a calendar in evidence which indicates that the claimant worked 39.5 hours for the week beginning November 19 and ending November 25, 2008. Further, the evidence indicates that the claimant worked 8 hours per day on December 3, 4, 5, and 8, 2008, for a total of 32 hours. The 40 hours reflected in the wage information for the week ending December 9, 2008, included the 8 hours worked by the claimant on December 9, 2008. The claimant's disability period at issue ended December 8, 2008, therefore any hours worked on December 9, 2008, should not be included in the calculation of TIBs.

The carrier argues on appeal that the post-injury earnings available based on the BFOE in the amount of \$440.00 per week should be considered. However, it is undisputed that the claimant was not actually paid \$440.00 per week. The evidence indicates that the claimant was not able to work 40 hours per week for various reasons including weather conditions and economic conditions that affected the employer. The hearing officer did not include December 3 through December 8, 2008, in her calculations to determine the partial TIBs the claimant is entitled to.

Pursuant to Section 408.301(a), 70% of the amount of the claimant's weekly earnings after the injury (a total of \$6,062.20 from July 23 through December 8, 2008)¹ subtracted from the claimant's stipulated AWW is \$5,239.85.

Work Week	Earnings	AWW	Difference	70%	PTIBs Due
07/23/08-07/29/08	\$374.00	\$677.38	\$303.38	0.70	\$212.37
07/30/08-08/05/08	\$352.00	\$677.38	\$325.38	0.70	\$227.77
08/06/08-08/12/08	\$352.00	\$677.38	\$325.38	0.70	\$227.77
08/13/08-08/19/08	\$319.00	\$677.38	\$358.38	0.70	\$250.87
08/20/08-08/26/08	\$187.00	\$677.38	\$490.38	0.70	\$343.27
08/27/08-09/02/08	\$352.00	\$677.38	\$325.38	0.70	\$227.77

¹ We note that the calculations were made on a weekly basis rather than the total for the disability period in question.

09/03/08-09/09/08	\$440.00	\$677.38	\$237.38	0.70	\$166.17
09/10/08-09/16/08	\$176.00	\$677.38	\$501.38	0.70	\$350.97
09/17/08-09/23/08	\$143.00	\$677.38	\$534.38	0.70	\$374.07
09/24/08-09/30/08	\$363.00	\$677.38	\$314.38	0.70	\$220.07
10/01/08-10/07/08	\$418.00	\$677.38	\$259.38	0.70	\$181.57
10/08/08-10/14/08	\$403.62	\$677.38	\$273.76	0.70	\$191.63
10/15/08-10/21/08	\$78.88	\$677.38	\$598.50	0.70	\$418.95
10/22/08-10/28/08	\$143.00	\$677.38	\$534.38	0.70	\$374.07
10/29/08-11/04/08	\$266.70	\$677.38	\$410.68	0.70	\$287.48
11/05/08-11/11/08	\$324.50	\$677.38	\$352.88	0.70	\$247.02
11/12/08-11/18/08	\$319.00	\$677.38	\$358.38	0.70	\$250.87
11/19/08-11/25/08	\$434.50	\$677.38	\$242.88	0.70	\$170.02
11/26/08-12/02/08	\$264.00	\$677.38	\$413.38	0.70	\$289.37
12/03/08-12/08/08	\$352.00	\$677.38	\$325.38	0.70	\$227.77
TOTAL					\$5,239.85

The hearing officer's determination that the claimant is entitled to partial TIBs in the amount of \$5,033.96 is against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the claimant is entitled to partial TIBs in the amount of \$5,033.96 and render a new decision that the claimant is entitled to partial TIBs in the amount of \$5,239.85.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge