

**ADOPTED NEW §§129.1-129.3 and §§129.5-129.7
AND REPEAL OF §§129.1, 129.2 and 129.5
Temporary Income Benefits**

**PREAMBLE FOR ADOPTION OF NEW §§129.1-129.3 and §§129.5-129.7
AND REPEAL OF §§129.1, 129.2 and 129.5**

INTRODUCTION

The Texas Workers' Compensation Commission (the Commission) adopts new §129.1 concerning Definitions for Temporary Income Benefits, §129.2 concerning Entitlement to Temporary Income Benefits, §129.3 concerning Amount of Temporary Income Benefits, §129.5 concerning Work Status Reports, §129.6 concerning Bona Fide Offers of Employment, and §129.7 concerning Non-Reimbursable Employer Payments and simultaneously repeals former §129.1 concerning Definitions for Temporary Income Benefits Calculation, §129.2 concerning Calculation of Temporary Income Benefit for Employees Who Earn Less Than \$8.50 Per Hour, and §129.5 concerning Bona Fide Offers of Employment with changes to the proposed text as published in the August 27, 1999, issue of the Texas Register (24 TexReg 6644).

As required by the Government Code, §2001.033(1), the Commission's reasoned justification for these rules is set out in this order which includes the preamble, which in turn includes the rules. This preamble contains a summary of the factual basis for the rules, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rules, and the reasons why the Commission disagrees with some of the comments and proposals.

Changes made to the proposed rule are in response to public comment received in writing and at a public hearing held on September 16, 1999, and are described in the summary of comments and responses section of this preamble. Other changes were made for consistency or to correct typographical or grammatical errors and to address issues identified by the Commission during its reexamination of the rule while considering the input provided by the public. Changes were made to all of the proposed rules.

The additions are in response to new legislation enacted by the 76th Texas Legislature. At the same time, these actions also include in the rules some of the Commission's long standing policies and address problems with the rules that were identified by the Claims Service Task Force (a group of participants from the system appointed by the Commission to serve as a sounding board for ideas regarding rule development in the area of claims service), other system participants, and Commission staff. Other changes from the current rules were made to simplify and shorten rule construction. The structure of the new rules is more prescriptive and clear compared to the old rules they replace. Further, the new rules clearly lay out expectations so that all system participants will understand the requirements that the Act and rules place on them. It is expected that together, these changes will improve benefit delivery, reduce disputes, make dispute resolution easier, reduce violations, and make it easier to hold system participants accountable for their actions and inactions.

*Adopted new and repealed rules in Chapter 129 (Temporary Income Benefits). Adopted by the Commission at the December 2, 1999 public meeting and scheduled to be published in the December 17, 1999 issue of the Texas Register.
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Specifically, House Bill 2510 made changes to address required medical examinations; House Bill 2513 required the Commission to promote communication to enhance return to work; and House Bill 2842 amended the Texas Labor Code to clarify salary continuation. In addition, House Bill 2511 amended Texas Labor Code, §401.024 authorizing the Commission to adopt rules to require electronic transmission of information by means such as facsimile, email, and electronic data interchange. This authorization is utilized in the proposed rules and amendments to achieve a legislative goal of reducing paper communication requirements in the workers' compensation system while ensuring timely and effective communication between system participants.

Repeal of §129.1 - Definitions for Temporary Income Benefits Calculation

This rule was repealed to allow a more extensive definition section that is more useful. The concepts contained in the previous rule were moved to the new rules. The concept previously contained in subsection (a) was moved to new §129.1 but rewritten to more closely resemble the general usage of the term and the concept is further detailed in new §129.2. The previous language of subsection (b) was deleted because it is not a definition and the concept was moved to new §129.3.

New §129.1 - Definitions for Temporary Income Benefits

Definition of Weekly Earnings After the Injury has been rewritten to more closely resemble the general usage of the term and the concept is further detailed in new §129.2. In addition, definitions for salary continuation and salary supplementation have been added which are used in new §129.2. Salary supplementation has been defined to include the voluntary use of accrued vacation or sick leave in a supplementary manner.

Repeal of §129.2 - Calculation of Temporary Income Benefit for Employees Who Earn Less Than \$8.50 Per Hour

This rule was repealed because, it only covers employees who earn less than \$8.50 per hour, and has been used to justify paying "windfalls" to employees (a windfall involves paying an employee the minimum compensation rate in temporary income benefits (TIBs) even if the employee's actual lost wages are less than that). The justification for windfalls in this case was that the rule specified that if the amount of TIBs calculated based on lost wages was less than the minimum compensation rate, the carrier was required to pay the minimum. The rule was also generally not detailed enough to ensure that the proper amount of TIBs is paid to the employee. This was particularly true in cases where the employer pays salary continuation in an amount less than the employee's average weekly wage (AWW).

New §129.2 - Entitlement to Temporary Income Benefits

This new rule provides a conceptual overview of entitlement to TIBs and explains what is and is not considered post injury earnings (PIE), which is needed to calculate the lost wages and ensure the proper amount of TIBs is paid under the new §129.3. The requirements of this rule are essentially the same methodology used by the Commission in enforcement actions for the past several years. The new legislation helped support this methodology and it should help reduce confusion that may have existed. The level of detail included in this rule as well as new §129.3 is

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intended to address several common misunderstandings relating to calculating the amount of TIBs to be paid and to ensure that the employee receives TIBs in the amount to which the employee is entitled.

Subsections (a) and (b) outline entitlement to TIBs and explain that it is based on lost wages due to the compensable injury. Subsections (c) and (d) clearly indicate what is and is not considered PIE.

New §129.3 - Amount of Temporary Income Benefits

This rule provides specific instruction on how to calculate the amount of TIBs that is due. As with new §129.2, the methodology is essentially the same methodology that has been used by the Commission in enforcement actions for the past several years and is intended to help to resolve common misunderstandings by both carriers and employees regarding the calculation of TIBs. In addition, the rule is written in a prescriptive format, to more clearly lay out the requirements.

Subsection (a) is an overview on applicability which requires a carrier to pay an employee the amount of TIBs the employee is entitled to in accordance with this chapter. Subsection (b) contains the concept originally contained in the previous §129.1(b) which was the methodology to determine whether an employee earns less \$8.50 per hour. The previous language tied the determination to the hourly wage that the employee was earning on the date of injury.

Unfortunately this was almost impossible to determine in many cases because many employees are paid overtime and their hourly wage could be affected by whether they were working overtime that day. This in turn could mean that two employees who had the same job and the same injury could be entitled to different amounts of TIBs because one was injured while working overtime and the other was not. In addition, employers have not been required to report the hourly wage the employee was earning on the date of injury which has made this calculation more difficult still. The new rule does two things. First, it ties hourly wage to the AWW. Because the statute ties income benefits to the AWW of the 13 consecutive weeks prior to the injury, the rule follows this lead and ties the determination of the hourly wage to the AWW. Secondly, it provides three different methods for making the determination depending on what information the carrier has available and lays them out in order of preference.

Although the calculation of the hourly wage is designed to be accomplished using the AWW and average hours worked during the 13 week period, an employer is not required to provide this information to the carrier until at least 30 days after the date of injury. Therefore, during this period prior to receiving the Wage Statement (TWCC-3), the carrier must rely on another method to make the calculation. The preferred method is to use the wage information on the Employer's First Report of Injury (TWCC-1). However, there are times that the employer does not timely or correctly provide the carrier this information and so, again, the carrier must rely on another method. In the case where the carrier has a TWCC-3, the carrier is instructed to use it. In the case where the carrier does not have a TWCC-3 but does have the TWCC-1, the carrier is instructed to use the TWCC-1. If the carrier does not have wage information available through

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the TWCC-3 or the TWCC-1, the carrier is instructed to obtain the information from the employer or the employee and use it until the carrier is able to obtain a TWCC-1 or a TWCC-3 from the employer.

Subsection (c) requires the carrier to calculate the AWW in accordance with Chapter 128 (relating to Benefits - Calculation of Average Weekly Wage) and the PIE in accordance with §129.2. In addition, the carrier is required to use specific wage information in order to ensure that the proper amount of TIBs is paid. The Commission has found that often when an employer reports wage information in a generic manner such as stating , the employee returned to work "at full salary" or that the employer has a salary continuation program and is continuing "full salary," employees do not receive benefits they are entitled to. This is because for workers' compensation purposes, the statute considers "full salary" to be AWW which includes overtime if generally worked. Most employers consider full salary to be a 40 hour week. Therefore, if the employee AWW was equal to \$550 based on 40 hours of normal pay and 10 hours per week of overtime, and the employer continues "full salary" after the injury (which would be \$400), the employee would be entitled to TIBs based on the lost wages of \$150. Yet, if the carrier simply takes the employer at its word that it is continuing "full salary" then the employee will not get TIBs. The requirement that the carrier base its calculations on the specific wage information, will help ensure that employees receive the income benefits to which they are entitled to. Changes being simultaneously made to §120.3 (relating to Employer's Supplemental Report of Injury) are designed to clarify that employers must report PIE information in the specific amounts being paid.

Subsection (d) requires the carrier to subtract the PIE from the AWW to determine the employee's lost wages. Subsection (e) specifies that if a PIE is greater than or equal to AWW then there are no lost wages and the carrier is not to pay TIBs. Because salary continuation is a form of PIE, these subsections establish that an employee will not receive TIBs if the amount of salary continuation equals or exceeds the AWW which clarifies one of the provisions of House Bill 2842 - that salary continuation can be paid in lieu of TIBs. This methodology is identical to the methodology that the Commission has used in enforcement actions for the past several years.

Subsection (f) specifies the percentage of lost wages that an employee is entitled to in TIBs. The entitlement is based on the employee's hourly wage and whether the week of benefits being paid is one of the first 26 weeks. Subsection (g) provides that the amount of TIBs to which an employee is entitled is limited to the statutory maximum and also includes a change from the previous rules to the minimum compensation rate. The main change that this rule represents compared to the previous one relates to the "windfall" issue. As described above, a windfall occurs when an employee receives more money through TIBs than the employee actually lost as a result of the injury. This generally occurs when the employee has returned to work but attends doctor's appointments once or twice a week. The actual lost wages may be less than \$30, but paying the minimum compensation rate would more than double that amount. As a result, the employee's income through wages and TIBs exceeds the AWW. This provides a disincentive to work toward a "full release."

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When the legislature began to examine the issues associated with workers' compensation in Texas it formed the Joint Select Committee on Workers Compensation Insurance which presented a set of recommendations for workers' compensation reform to the 71st Texas Legislature. Included in these recommendations was that reform ensure that temporary benefits replace a high proportion of after-tax lost earnings. It is clear that the intent of TIBs is to replace a high proportion of employees' lost wages, not to pay them more through workers' compensation than they earned while working. To apply the minimum compensation rate in cases where the lost wages are relatively minor would defeat the purpose of TIBs.

At the same time, the Legislature also put a minimum compensation rate in the statute and said that it applied to TIBs. In trying to reconcile these seeming incompatible positions, it is believed that the Legislature intended for the minimum compensation rate to ensure that an employee whose AWW was extremely low, be given a "floor" below which the employee's TIBs would not fall, not to provide windfalls to employees whose earning capacity was barely affected by the injury.

Therefore, the subsection specifies that if the amount of TIBs to which the employee is entitled under subsection (f) when combined with the employee's PIE is less than the minimum compensation rate, then the minimum rate applies and the carrier is required to pay that rate. Otherwise, the carrier will pay TIBs specifically based on the lost wages. This is to ensure the purpose of the statute is met without providing a disincentive to achieving a full release to return to work.

Repeal of §129.5 - Bona Fide Offers of Employment

Previous §129.5 did not reflect the way the system functions and as a result was inadequate to govern modified duty offers. Often a treating doctor would release an employee to "light duty" with little specificity of what restrictions an employee is to operate under. Then the employer would send a letter to the employee similarly offering "light duty" and tell the carrier that the employee never responded to the offer which the carrier then uses to suspend TIBs. Unfortunately, since the employer's letter did not have any detail regarding what the job entailed and since the treating doctor did not specify the employee's limitations or abilities, this would lead to disputes and inappropriate suspensions of benefits. This was made more difficult by the fact that the prior rule did not require the offer to be in writing or the carrier to have copies of the doctor's release or the employer's offer. The previous rule seemed to anticipate that the Commission will make the final decisions regarding bona fide offers, but it did not provide guidance to any of the system participants as to what they should or should not do. The new rule provides guidance in cases that do not go to dispute resolution, which is the norm rather than the exception.

New §129.5 - Work Status Reports

This rule is intended to address the requirements of House Bill 2513 which requires the Commission to promote communication between employers and treating doctors regarding

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modified duty opportunities. The rule creates a new report to be filed by the treating doctor called the Work Status Report which will provide the carrier and the employer with information about the employee's ability to work to enable the employer to offer a modified duty position consistent with the employee's ability to work and restrictions. Filing a work status report is not the equivalent of a functional capacity evaluation (FCE). FCEs are not appropriate for all cases, but the Commission has authority to require one as appropriate.

Subsection (a) of the rule defines out two terms "doctor" and "work status." As used in the rule, the term "doctor" without any modifier such as "treating," "referral," or "RME" refers to both the treating doctor and a doctor to whom the treating doctor has referred the employee for regular treatment. "Work status" is one of three conditions: able to work without restriction, able to work with restrictions, or unable to work.

Subsection (b) describes the Work Status Report and requires it to indicate what the employee's current work status is and what job functions the employee can safely perform, as well as any restrictions on the employee's activities. The intent is to encourage the safe return to work, not to aggravate the employee's condition. Providing specific detail about the employee's limitations should help ensure that the employer is able to offer work which is truly consistent with the doctor's assessment.

Subsection (c) specifies that if a doctor indicates that the employee's work status does not allow the employee to return to work without restriction, the doctor must provide an estimated date of when this status will change. The intent of requiring estimated expirations for restrictions (whether modified duty restrictions or complete restriction from all work) is to promote return to work by making the evaluation of the length that restrictions are expected to last part of the process of making the restriction. Further this can aid in determining whether the employee continues to have disability in a period in which the employee has abandoned or does not need continuous medical treatment. An estimated expiration is speculative in nature; the further out the date is projected, the less accurate it may be. Therefore, the rule includes language to specify that an estimate is not binding.

Subsection (d) lays out the instances in which the Work Status Report is required to be filed. The report must be filed after the initial examination and is then required for every subsequent appointment but not more than once every two weeks unless the employee's work status changes. Subsection (e) provides that the report is required to be filed within one working day of the date of examination and provides who the report is to be filed with.

Since the Work Status Report will also be used by carriers to make decisions regarding payment of TIBs, it is imperative that the information be provided to the carrier as early as possible. Currently, benefit delivery is delayed in part because carriers are unable to timely obtain disability information. In addition, health care providers have long complained about the number of calls they receive from adjusters regarding disability status. With the provision of this information on a

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regular and timely basis through a required report, these calls should be significantly reduced.

Although the Work Status Report is required to be filed within one working day, the treating doctor is expected to provide a copy to the employee at the time of the examination. This will facilitate employee understanding of the doctor's restrictions and give the employee the opportunity to ask questions. The current draft of the report form is very simple to fill out with a "check-box" approach that will make completion easy. System participants, including a number of health care providers and carriers, have provided input into the draft report and changes have been made to make the report easy to fill out and easy to understand, but detailed enough to ensure that the employee's physical abilities are adequately explained.

Subsection (f) lays out two other conditions which require the treating doctor to file the Work Status Report. There may be cases where the treating doctor has not released the employee to return to work and the employer believes that it has a very good modified duty position which the employee would be able to work. In this situation, the employer is allowed to provide the treating doctor a set of functional job descriptions which list the physical and time demands of the positions so that the treating doctor can evaluate the positions. If the treating doctor receives a set of functional job descriptions the doctor will have to file a Work Status Report based on the descriptions. In addition, the treating doctor will have to file the Work Status Report if a required medical examination (RME) doctor believes that the employee can return to work. A report under this section is required to be filed within seven days with the employee, employer, and carrier.

Subsection (g) explains that filing the Work Status Report as required by subsection (f) does not require a new separate examination of the employee. One can be filled out using chart notes from the last examination. Filing of a Work Status Report in this situation is not equivalent to certifying maximum medical improvement and/or permanent impairment which must be done through an examination of the employee.

Subsection (h) requires use of "instant" communication such as electronic transmission through facsimile or email in those cases where the doctor has been provided with a facsimile number or email address of the recipient to reduce the delay in providing critical information for benefit delivery and reduce the use of paper as required by House Bill 2511. The language is written to make use of traditional postal mail a last resort for filing the report. As use of email and other forms of instant communication by system participants expands, the rules will reduce the reliance on traditional paper mail which has often caused over payments, underpayments, and delayed payments.

New §129.6 - Bona Fide Offers of Employment

This rule is intended to address the requirements of House Bill 2513 which requires the Commission to promote communication between employers and treating doctors regarding modified duty opportunities and to allow for the suspension or reduction of TIBs if a bona fide

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offer of modified duty is rejected. The rule is also designed to better specify the mechanism for modified duty offers to be made and the length of time the carrier must wait until it can deem an offer to have been rejected by the employee.

Subsection (a) allows an employer or carrier to request the treating doctor to evaluate the employee's work status by providing to the treating doctor, a set of functional job descriptions of positions that the employer has available to offer the employee. By requiring the request to include functional job descriptions, the treating doctor has some specific information on which to make a judgement regarding ability to work and should increase the likelihood that the employer is serious about making an offer. Although nothing previously prohibited employers or carriers from trying to initiate the process, there was no requirement for the treating doctor to cooperate with the request nor was there any structure as to how the request should be made.

Subsection (b) is an overview statement which explains that an employer may make a modified duty offer to the employee. The subsection also provides that in the absence of a report by the treating doctor, an offer may be made based on a certification of work abilities by another doctor based on their physical examination of the employee assuming that the treating doctor has not indicated disagreement with the certification. This is important because very often a treating doctor will send an employee to another doctor for regular treatment and this referral doctor may be the doctor who is filing the Work Status Report. Obviously it is appropriate for the employer to be able to make offers of employment based on such a report although the employer may make an offer based on another doctor's opinion as well.

Subsection (c) requires an offer of modified duty to be made in writing and in the form and manner prescribed by the Commission. The subsection also specifies what must be in the offer. The reason that the rule lists the items that must be in the offer is that carriers will be allowed to reduce or suspend TIBs if the employee rejects a bona fide offer. Therefore it is necessary to provide some structure to the offers to ensure that there is some confidence that the offer is legitimate. The originally proposed rule did not include this information because it specified that the offer had to be made on the Commission form and this information would have then been included on the form. The idea of a required form was dropped because it was not thought that having a standard form would greatly enhance the process.

Subsection (d) sets out the conditions that an offer must meet before the carrier can deem it to be a bona fide offer of employment and requires the carrier to have written copies of the employer's offer and the doctor's Work Status Report. This represents a change from the prior rule which did not provide guidance to carriers regarding how to judge an offer of employment. It also represents a change in that it requires the carrier to have a copy of the offer and certification in order to deem an offer to be bona fide. As discussed previously, these changes are necessary to address the reality of the system which is that carriers often make these decisions in the absence of dispute resolution and often without the benefit of all the facts. This subsection should ensure that carriers have the information necessary to determine whether an offer of employment is bona

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fide and can work with the employer to modify an offer does not meet the requirements to be considered bona fide.

Subsection (e) sets out the factors that the carrier must consider in determining whether an offer of employment is geographically accessible (one of the requirements for an offer to be deemed a bona fide offer). This addition is designed to provide some consistency to the review of offers of employment but still allows either the carrier or the employee to dispute the offer, if either believes that the standard is inappropriate.

Subsection (f) provides an order of preference which a carrier must apply when evaluating whether an offer of employment is bona fide. In essence this subsection tells the carrier what weight to give the opinion of various types of doctors. That way if multiple opinions are available, the carrier knows which one to give preference to. As described below, the ordering that this subsection provides does not mean that an offer of employment based on a certification of a doctor who the subsection ascribes less weight to than another doctor can not be bona fide. This subsection governs what weight the carrier must ascribe to an opinion. The carrier can always ask for a benefit review conference and allow the Commission to review the conflicting reports to decide whether the offer is bona fide.

Subsection (g) provides guidance regarding how long a carrier must wait before deeming the wages offered as part of a modified duty offer to be PIE because the employee rejected the modified duty position. This provision is a new concept that has been added to address two problems with the existing process. The first relates to how much time an employee has to decide whether to accept a modified duty offer. Given mail time (should the employee not have a means of receiving facsimile or electronic transmissions) and work schedules, this has proven difficult under the current system.

The second problem is that sometimes an employer offers a modified duty position which turns out to have greater physical demands than the employer initially stated. In many of these cases the employee is familiar with the position because it is one that the employer regularly offers to employees. The rule allows the employee time to talk to the treating doctor to ensure that the position truly meets the employee's restrictions. Nothing in this subsection prevents a carrier from adjusting TIBs if the employee immediately accepts the offer and begins work since those wages would be actual PIE and not "deemed" PIE resulting from a rejected bona fide offer of employment.

Subsection (h) was added to make it clear that both the employee and the carrier are entitled to request a benefit review conference relating to an offer of employment if they are dissatisfied with the outcome of following the rule. This rule is designed to allow carriers to take actions relating to offers of employment by allowing them to deem an offer of employment to be bona fide under certain conditions. In laying out these conditions, the Commission has attempted to identify the conditions under which the Commission would likely find an offer to be bona fide if it were to be

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brought to the Commission for dispute resolution. However, this subsection recognizes that this rule like any other can not account for every possible set of facts. In those situations in which a party believes the rule produces an incorrect result it is appropriate for that issue to be brought to the Commission for dispute resolution.

New §129.7. - Non-Reimbursable Employer Payments

This rule addresses that while an employer can initiate "benefits" during a period in which the carrier has not yet accepted a claim and which are reimbursable to the employer (as provided in Texas Labor Code, §408.003, and new §126.13), payment of salary continuation or salary supplementation is not an employer initiation of "benefits." Salary continuation is a type of PIE which reduces the amount TIBs the employee receives. If an employer pays salary continuation and then attempts to be reimbursed from the employee, the employee would not receive all the compensation the employee is entitled to. Further, the employer is not allowed to ask for reimbursement of any other kind of PIE. For example, an employer who provides an employee wages for modified duty is not allowed to go back to the carrier and ask for that money back. The main advantage of providing modified duty, salary continuation, or any other PIE is that it reduces the amount that the employer has to pay in benefits which positively reflects on the loss ratio for the employer's policy and can help keep premium costs down.

Comments on the proposed amendments were received from the following groups: Concentra Health Services; KSF Orthopaedic Center; Texas Orthopedic Administrators Association; Applied Risk Management; Texas Workers' Compensation Insurance Fund; PRS Inc.; Medway Affiliated Physicians and Recovery Analysis; Lockheed Martin Tactical Aircraft Systems; Liberty Mutual; Hammerman & Gainer; Flahive Ogden & Latson; Texas Association of Business & Chambers of Commerce; Texas Orthopedic Association; Alliance of American Insurers; TXU Business Services; Injured Workers' Assistance Center; as well as several individuals.

Texas Orthopedic Administrators Association; Lockheed Martin Tactical Aircraft Systems; Texas Association of Business & Chambers of Commerce; Texas Workers' Compensation Insurance Fund; PRS Inc.; Medway Affiliated Physicians and Recovery Analysis; and Liberty Mutual indicated support for some of the proposals.

KSF Orthopaedic Center; Texas Orthopedic Administrators Association; Texas Workers' Compensation Insurance Fund; Lockheed Martin Tactical Aircraft Systems; TXU Business Services; and Injured Workers' Assistance Center indicated opposition to some of the proposals. In addition, many of the commentors provided suggestions for alternate language or ideas to improve the rules. Some also asked for clarification on some of the proposals.

Summaries of the comments and Commission responses follow.

General Chapter 129 Comments

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Comment: Commentor offered the following concern relating to calculating the AWW: "There is ongoing controversy regarding whether AWW should be adjusted if an employer continues a nonpecuniary fringe benefit for a while after an injury, but later discontinues the benefit.

The controversy arises from the difference in wording between the Labor Code and the existing (and proposed) rule on AWW. Labor Code, §408.045 states: "The commission may not include nonpecuniary wages in computing an employee's average weekly wage during a period in which the employer continues to provide the nonpecuniary wages."

However, TWCC §128.1(c)(2) says AWW does not include "the market value of any non-pecuniary advantage that the employer continues to provide after the date of injury."

The wording difference from "during a period in which the employer continues to provide" to "that the employer continues to provide" has caused controversy and opposing Appeals Panel Decisions on the topic."

The commentor suggested that "[s]taff should propose and the commissioners should adopt an amendment to Chapter 128 either authorizing the carrier to adjust AWW when nonpecuniary benefits are no longer continued, or stating clearly that AWW is not to be adjusted in this case. The Chapter 128 rule should specifically specify whether or not the AWW calculation is a one-time calculation for the entire life of the claim."

Response: Commission agrees the this issue needs to be clarified by rule however, these comments relate to the calculation of the AWW and are not directly relevant to the rules being adopted here. The Commission currently has a rule development team taking a more in-depth look at issues associated with calculating the AWW and the commentor's suggestion has been forwarded to that team. AWW can be recalculated multiple times. In addition to looking at Texas Labor Code, §408.045 which the commentor correctly points out prohibits including "[nonpecuniary] wages in computing an employee's average weekly wage during a period in which the employer continues to provide the [nonpecuniary] wages" looking at Texas Labor Code, §408.041, provides additional guidance on the issue in that it defines the AWW as the average of the sum of the wages paid for the 13 weeks prior to the injury. Taken together, these sections require that the AWW be calculated from the average of the sum of all wages paid for the 13 weeks prior to the injury EXCEPT those nonpecuniary wages which the employer is continuing to pay during the period for which benefits are being paid. For example, if an employer continues to provide health insurance (which is defined as a nonpecuniary wage by §126.1) for six months following the injury, then these wages are not included in the AWW used to calculate income benefits for those six months. However, if, after six months, the employer stops providing the health insurance, then the AWW to be used to calculate benefits for the period after the employer has discontinued providing the nonpecuniary wage must include the cost of those wages (i.e. the health insurance). This is because §408.045 only forbids including

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nonpecuniary wages in the AWW during a period in which the employer is continuing to provide them.

Comment: Commentor stated that there was inconsistent use of "employee" and "injured employee" and "carrier" and "insurance carrier."

Response: Commission disagrees. The Commission is attempting to standardize use of these terms in rules consistent with Commission Rule §102.7 (relating to abbreviations). The first time a rule refers to the injured employee or the insurance carrier, the full terms are used. Subsequent references are made using the abbreviated terms to shorten and simplify the rule.

Comment: Commentor offered the following: "[i]n calculating TIBs there was an advisory that I can no longer find, that stated that commissions are calculated up to the day of disability or injury. Commissioned sales people do not rely on salary so a loss of accurately calculating commissions can be devastating. I made \$1200 the week I was injured and would have made \$2000 the next week. It is hard to see the upside to having a WC injury isn't it? If the carrier could skip the injury week, then it would have dropped the AWW. You need a method for calculating commissioned sales people better than the current way."

Response: These comments relate to the calculation of the AWW and are not directly relevant to the rules being adopted here. Calculation of the AWW is governed by Texas Labor Code, Subchapter C of Chapter 408. In the vast majority of claims the AWW is calculated using the wages from the 13 consecutive weeks immediately preceding the injury. It appears that the legislature picked this period of time to ensure that variations in an employee's earnings are captured and that the resulting AWW is reflective of the employee's true earnings. Regarding the commissioned employee wage issue raised by the commentor, this situation is no different for an hourly worker whose wages fluctuate widely from week to week. However, in both situations, by averaging 13 weeks of wages, the methodology is intended to take these variations into account and come up with a result which truly approximates the employee's wages.

Rule 129.1 - Definitions for Temporary Income Benefits

Comment: One commentor suggested that the Commission put all definitions into one rule rather than having definitions interspersed throughout various chapters of the rules.

Response: Commission disagrees. Having definitions placed at the beginning of a chapter or subchapter helps ensure that the definitions are located where the user can easily find them. Putting all of the definitions in one rule could result in an extremely long rule which would be continually amended to update and add terms. The specific items defined in this rule are terms which are primarily used in connection with TIBs. Since this chapter is entitled "Temporary Income Benefits" this was the logical place to put these particular definitions.

ADOPTED NEW §§129.1-129.3 and §§129.5-129.7

AND REPEAL OF §§129.1, 129.2 and 129.5

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Rule 129.2 - Entitlement to Temporary Income Benefits

Comment: Commentor offered the following comment raising concern of inconsistencies between the way the TIBs are calculated and the way the AWW is calculated: "Rule 128.1 says that for the purpose of calculating TIBs, AWW includes (among other things) health care premiums paid by the employer. Proposed §126.1, however, says that health care premiums paid by the employer are nonpecuniary wages. The proposed §129.2(d), relating to Entitlement to Temporary Income Benefits, goes on to state that nonpecuniary wages paid to the employee by the employer after the injury are not to be included in PIE.

This means that although the value of the health insurance will be counted in the AWW, it will not be counted as PIE even if the employer continues to provide it. The result is that the carrier will have to pay TIBs on the value of the health insurance as a lost wage, even if the employee continues to receive it after the injury."

Commentor went on to recommend that §128.1(b)(2) be changed to read:

"the market value of any other nonpecuniary wage that the employer does not continue to provide after the date of injury."

Commentor also suggested "deletion of §128.1(b)(3), since health insurance premiums are lumped in with nonpecuniary wages now, and they are included within the scope of §128.1(b)(2)" and adding clarification in the rule regarding whether the "AWW should be adjusted if nonpecuniary wages are continued for a time after the injury and then discontinued."

Response: Commission agrees that to clarify the issues regarding calculation of TIBs and AWW, §128.1 may need to be changed. The Commission currently has a rule development team taking a more in-depth look at issues associated with calculating the AWW and benefit rates and the commentor's suggestions have been forwarded that team.

The inconsistencies which the commentor described should not cause significant difficulty. The standard should be clear because §126.1 defines nonpecuniary wages as including health insurance premiums and Texas Labor Code, §408.045 forbids including nonpecuniary wages in the AWW during a period in which the employer continues to provide the wages. Carriers will be expected to apply this definition to the requirements of the statute in calculating the AWW.

Comment: Commentor indicated that he thought that it would be unfair to include sick leave as PIE because the employee theoretically earned sick leave days prior to the injury and it seemed unfair to now allow the employer to take those days and not have the employee receive TIBs. The commentor asked why should the employer be able to take these and not have the employee receive TIBs? The commentor argued that this takes away something that the employee earned during a period in which he was not injured and then unfairly penalizes them. Discussion with this

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commentor revealed that in part, the commentor was concerned that as written, the rule would not allow an employee to voluntarily use sick leave to supplement income benefits.

Response: Commission agrees in part. The employee should be allowed to use accrued sick leave or vacation pay to supplement the amount of income benefits they are receiving up to the AWW. However, the employee should not be able to supplement income benefits any higher because, this would provide a disincentive to return to work which is clearly not the goal of the statute. Therefore, the definition of salary supplementation in §129.1 has been changed as follows:

- (2) Salary Supplementation (also Wage Supplementation) - Monies paid by the employer to supplement the amount of income benefits an insurance carrier pays to an employee with a compensable injury. This includes monies paid to the employee based on the employee's voluntary use of sick leave or annual leave in a supplementary manner.

In addition, in §129.2, subsection (c)(4) has been amended and a new subsection (c)(5) has been added as follows:

- (4) the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury;
- (5) the value of any partial days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury that, when combined with the employee's TIBs, exceeds the AWW; and

Finally, subsection (d)(3) of §129.2 was amended as follows:

- (3) any wages paid by the employer as salary supplementation as provided by Texas Labor Code, §408.003(a)(2);

Comment: Commentors suggested changing subsection (d)(5) to specify that the indemnity disability program being referred to in this section was one not provided by the employer.

Response: Commission agrees. This language was intended to refer to insurance that the employee may have purchased on his or her own. To clarify this, the subsection has been changed as follows:

- (5) any money paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation.

Comment: Commentor asked how voluntary use of vacation would be determined in

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subsections (c)(2) and (d)(2) and what documentation there would need to be.

Response: Employers are required to report all PIE under §120.3 (relating to Employer's Supplemental Report of Injury). This report would serve as the primary source of documentation for the information. If the employee disagrees with anything which has been reported to the carrier and its effect on benefits, the employee can contact the carrier to resolve the issue and if unable to resolve it, the employee is entitled to request a Benefit Review Conference. Employers are, however, cautioned to accurately report this information because reporting it incorrectly can result in employees not receiving benefits to which they are entitled and conversely result in employees receiving benefits to which they are not entitled.

Rule 129.3 - Amount of Temporary Income Benefits

Comment: Commentor supported "the calculations as they are easy to follow."

Response: Commission agrees.

Comment: Commentor asked whether reading §129.3 an employer or employee would know how to calculate the amount of TIBs that the employee is entitled to or that the employer should pay.

Response: Commission believes that employers and employees should both be able to calculate the correct TIBs rate by reading this rule. The proposed rule was easy to follow with the various steps in the process broken out into related and manageable subsections. Further, the language follows a "step-by-step" style that is designed to make the process easier to understand.

Calculating the amount of TIBs is not the simplest calculation regardless of how the rule is written. However, in the past, this process was made more difficult by the fact that most system participants seemed to think that there were two different formulas for calculating the amount of TIBs: one if the employee was completely off work and another if the employee was back at work on modified duty. This approach often led to improper calculations and resulted in the issuance of Notices of Violations to carriers. Nevertheless, while reviewing the rule and comments on subsection (i), several ways to simplify the rule further were identified and changes were made to combine concepts in proposed subsections (f), (g), (h), and (i) into two subsections and simplify the language as indicated in response to other comments on this rule.

Comment: Commentor felt that §129.3 appeared to allow the employer to take credit if the employer is continuing to pay health insurance. The commentor observed that often the employer will continue to pay the benefits for three months so those fringe amounts will not be calculated in the AWW and will not be compensated as TIBs. Then the employer will terminate the employee but the carrier will not add the loss of the health insurance into the AWW which means that the employee is not being completely compensated for lost wages.

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The commentor suggested that something be added to the rule which specifies that if the employer ceases to pay health insurance, then that should be added into the AWW.

Response: Commission agrees that this issue needs to be clarified by rule. As indicated, the Commission currently has a rule development team taking a more in-depth look at issues associated with calculating the AWW and the commentor's suggestion has been forwarded that team. The immediate concern identified by the commentor relates to recalculating the AWW when the employer discontinues providing a nonpecuniary wage (in this case health insurance premiums). As discussed previously, if an employer stops providing the health insurance, then the AWW to be used to calculate benefits for the period after the employer has discontinued providing the nonpecuniary wage must include the amount of those newly lost wages. This is because §408.045 only forbids including nonpecuniary wages in the AWW during a period in which the employer is continuing to provide them. Once the employer stops providing the benefit, the employee experiences a change in earnings which the employer must report with a Supplemental Report of Injury under §120.3 (relating to Employer's Supplemental Report of Injury) and this will trigger the carrier's duty to recalculate the AWW, PIE and thus the TIBs rate.

Comment: Commentor asked whether vacation would be counted as 40 hours worked or 0 hours worked in the calculation of hourly wage under subsection (b)(1).

Response: Vacation paid during the 13 weeks immediately preceding the injury is not treated any differently than other pecuniary wages paid to the employee. The number of hours that are counted is dependant on the number of hours of vacation paid. If the employee was paid for 40 hours of vacation, then the number of hours is 40. If an employee was paid 16 hours of vacation and 24 hours of normal salary for a week, the number of hours is still 40. Basically, the carrier divides the total wages by the total hours reported by the employer.

Comment: Commentor asked how recent the information from the employee needed to be (i.e. for what time period/range) as referred to in subsection (b)(3).

Response: The information should be relatively recent (certainly within the 13 weeks immediately preceding the injury). The inclusion of subsection (b)(3) was merely to provide guidance on how to calculate the hourly wage in the absence of a Wage Statement or an Employer's First Report of Injury. Subsection (b)(3) is not expected to be applied often.

Comment: Commentor asked why subsection (c) refers to using information from the employee if the employer has already given information.

Response: The employer is the primary source of information needed to determine the AWW and an employee's PIE. However, employers do not always timely or correctly report this information. Further, sometimes an employee begins to earn additional money from a second job that the employee was not earning prior to the compensable injury. As such, the carrier is not

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likely to receive such information from the employer where the injury occurred.

Comment: Commentor offered the following: "[t]he example used in the introduction to proposed §129.3, regarding an employee with a \$400 per week base wage and a \$550 per week AWW is incomplete. The example indicates that if the employee is off work and receiving salary continuation benefits or working restricted duty, the employee will receive \$105 per week in TIBs, in addition to the employer's payments of \$400 per week, for a total of \$505 per week.

The example did not point out that if this employee worked only one hour of overtime during the thirteen weeks prior to the injury, the AWW would be \$401. In this case, if the employee receives regular base pay of \$400 per week through salary continuation or while working restricted duty, he or she will also receive the current minimum TIBs of \$70 per week.

Either of the scenarios above provides a disincentive to working towards a "full release." Still, a "full release" does not end entitlement to TIBs if a physician has not certified that the employee has reached MMI. Also, in either scenario the employee is entitled to an advance of income benefits under proposed §126.4(c) since the TIBs do not equal 90% of the employee's net pre-injury wage.

The introduction to proposed §129.3 indicates that it is clear that the intent of TIBs is to replace a high proportion of employees' lost wages, not to overcompensate them. If the employee in the example is off work and receiving no salary continuation payments from the employer, based on the AWW of \$550 the employee's TIBs amount is \$385, which, under the Act, is considered a high proportion of the employee's lost wages. However, if the employer continues to pay the employee through salary continuation while he or she is off work and later provides restricted duty work, the employee's base wage of \$400 per week is not considered to be a high proportion of the employee's lost wages."

Response: Commission disagrees. The commentor's suggestion that the proposed language in subsection (i) would allow an employee with \$1 per week in lost wages to receive the minimum compensation rate is incorrect. In the commentor's example, the employee's AWW was \$401 and the employer continued to pay salary in the amount of \$400. This resulted in lost wages of \$1 per week. Proposed subsection (i) would only require the minimum compensation rate to be paid if the lost wages were less than the minimum (which they are) AND the employee's AWW is less than the minimum (which, in the example, it is not).

The commentor's discussion of the difference between a person receiving only TIBs of \$385 because of no PIE compared to an employee receiving \$400 in salary continuation plus \$105 in TIBs in essence argues that if the employee is receiving salary continuation (or any other type of PIE) that equals or exceeds the amount of TIBs that the carrier would pay if there were not PIE, then the carrier should not have to pay benefits. What this reasoning does not account for is that income benefits are non-taxable while the payment of salary and other PIE is taxable. Taken to

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their logical extreme, the commentor's position would not allow income benefits to be paid in this case if the employee had returned to work on modified duty earning less money per hour (because it is a different position) but who happened to be paid \$385 per week. This is not correct, because the statute requires TIBs to be paid if there is disability and lost wages (which is the case in all these examples).

The commentor's concern about an employee being entitled to an advance even if the combined earnings and income benefits are more than 90% of the net pre-injury earnings is valid. Section 126.4(c) (relating to Advance of Benefits Based on Financial Hardship) has been changed as explained in the preamble adopting changes to Chapter 126.

In reviewing these comments and preparing the response, §129.2 was reviewed with regard to earnings from another source. The Commission's policy on this issue is that any earnings which the employee receives from a job the employee had prior to the injury are not considered PIE unless the amount earned on this job after the injury exceeds the amount earned prior to the job. Essentially, if the employee was earning \$100 per week in a second job the employee had prior to the injury and the employee continues to earn \$100 per week after the injury from this job, those earnings are not considered PIE. However, if, after the injury, the employee starts earning \$250 per week from the second job, then \$150 per week would be considered PIE. Similarly if an employee did not have a second job prior to the injury and gets one subsequent to the injury, then all earnings from that job are included in PIE.

Though the Commission recognizes the need to address this issue more fully, the issue is one which it is expected that system participants would be interested in commenting on. Therefore, rather than provide guidance beyond the above discussion through changes to these rules, the Commission will consider proposing a new rule or amendments to these rules at a future date. The Commission currently has a rule development team taking a more in-depth look at issues associated TIBs and this issue has been forwarded that team.

Comment: Commentor noted that "[a]ccording to the preamble, this change is intended to avoid the windfall resulting to employees who return to work and miss very little time, thus producing small differences in the average weekly wage and post-injury earnings. The rule could be assured of effecting that result if it would take the last clause and put it at the front of the rule and add the word "only." The rule should read as follows: A carrier shall only pay the minimum TIB rate"

Response: Commission agrees that this subsection needs clarification in order to better accomplish its intent. Though the commentor's specific suggestion was not followed, the new language accomplishes the commentor's goal, which was to make it clear that the carrier is only required to pay the minimum compensation rate if certain conditions apply.

Comment: Commentors expressed concern that, as proposed, subsection (i) could still allow a

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windfall to be paid. One commentor suggested that the proposed language would allow a windfall to be paid in the situation in which the employee had returned to work at reduced earnings and recommended amending the subsection to say that the minimum TIBs rate does not apply when the employee has PIE.

Other commentors specifically expressed concern that the subsection would allow an employee to receive more in TIBs than the employee's AWW. This, one commentor argued, provides a disincentive to return to work. Another, in commenting on the same, suggested that the subsection be eliminated.

Another commentor argued that "[s]ince §408.062(a) of the Act sets the minimum TIBs benefit at 15% of the [state average weekly wage], it is unclear as to how proposed §129.3(i) addresses the "windfall" issue. When an employee, regardless of his or her hourly pay rate, is receiving salary continuation or is working restricted duty at a weekly rate that is even \$1.00 less than his AWW, he or she will receive the minimum TIBs, which is currently \$70 per week."

Response: Commission agrees that it is still possible for a "windfall" to occur. However, as indicated in the preamble, it seems clear that the Legislature in writing the statute intended to set a lower limit to the amount of TIBs that would have been paid to an employee. If this were not the case, there would be no need to include a "minimum" rate in the statute. Therefore, what this rule seeks to do is limit the applicability of the minimum to what the Legislature intended it to do - ensure that injured employees have some minimal level of funds during recovery from an injury (see also the previous discussion on legislative intent).

The suggestion that this subsection be eliminated will not result in the elimination of the "windfall" as contended by the Commentor. Without this subsection, or one similar to it, the carrier would be required to pay the minimum in all situations (even those that would result in a "windfall").

In reviewing the first commentor's suggestion that the minimum compensation rate does not apply if the employee has PIE, a method to better address the commentors' concerns was identified. Rather than the approach offered by the commentor, the rule has been changed to have the minimum not apply if payment of the minimum when added to the employee's PIE would exceed the AWW. This appears to meet the legislative intent of ensuring that an employee has access to a minimum level of funds during recovery from an injury.

However, in addition to addressing these commentors' concerns with the minimum compensation rate, the rule was also changed to address another commentor's implication that the rule was difficult to understand. Proposed subsections (f) and (g) were identified as possibly confusing and subsections (h) and (i) were likewise identified. In order to simplify the rule, proposed subsections (f) and (g) were combined into a new subsection (f) and proposed subsections (h) and (i) were also combined into a new subsection (g). In developing the new subsection (g), the language relating to the minimum compensation rate was also changed as described above. The

Adopted new and repealed rules in Chapter 129 (Temporary Income Benefits). Adopted by the Commission at the December 2, 1999 public meeting and scheduled to be published in the December 17, 1999 issue of the Texas Register.

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language was changed as follows:

- (f) Subject to the minimum and maximum TIBs rates as provided in subsection (g) of this section, an employee is entitled to TIBs as follows:
 - (1) an employee who earns \$8.50 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or
 - (2) an employee who earns less than \$8.50 per hour is entitled to TIBs as follows:
 - (A) 75% of the lost wages for the first 26 weeks of TIBs due; and
 - (B) 70% of the lost wages for all TIBs payments thereafter.
- (g) The carrier shall pay the TIBs in the amount calculated in subsection (f) of this section, unless:
 - (1) this amount is greater than the maximum weekly TIBs rate computed in accordance with Texas Labor Code, §408.061, in which case the carrier shall pay the maximum weekly TIBs rate; or
 - (2) this amount, when added to the employee's PIE, is less than the minimum weekly TIBs rate computed in accordance with Texas Labor Code, §408.062, in which case the carrier shall pay the minimum weekly TIBs rate.

Rule 129.5 - Work Status Reports

Comment: Commentor indicated agreement with the overall goals of the Work Status Report.

Response: Commission agrees.

Comment: Commentor stated "[w]e agree that a Work Status Report (standardized) would be of significant help to both the carrier and the providers. We are currently using many different versions of a Work Status Report to communicate to the carrier the information related in this new proposed rule. However, it would be of significant help in having a standardized format for all providers in order to communicate the information that they require and to effectively communicate to the employer the restrictions, if any that need to be met."

Response: Commission agrees.

Comment: Commentor stated "[t]he concept of work status reports is an excellent idea to facilitate communication regarding appropriate light duty in order to return injured employees safely to work. It also has the potential to reduce paperwork and contacts between parties to the

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system. [Commentor] supports the rule."

Response: Commission agrees.

Comment: Commentor "strongly supports the existence of a Work Status Report, especially one that has detailed check-boxes capturing an injured employee's ability to work."

Response: Commission agrees.

Staff Recommendation: In reviewing the comments on this rule, it was noted that the rule focuses on the treating doctor and does not reference referral doctors. The reality of the system is that often treating doctors will refer an employee to another doctor to "treat as necessary" at which point the referral doctor sees the employee more than the treating doctor. In this situation, the referral doctor is in a better position to regularly review and report on an employee's work status. Therefore, a new subsection (a) was added to the rule to clarify that the filing requirements of the rule refer to both the treating doctor and the referral doctor who is providing treatment at the direction of the treating doctor. In addition the term "treating doctor" was changed to "doctor" throughout the rule (except in one subsection which applies only to the treating doctor) in order to expand the application of the rule. The new subsection also has some additional language relating to what "work status" means and reads as follows:

- (a) As used in this section:
- (1) the term "doctor" means either the treating doctor or a doctor to whom the treating doctor has referred the injured employee (employee) for regular treatment; and
 - (2) the term "work status" refers to whether the employee's medical condition will:
 - (A) allow the employee to return to work without restrictions;
 - (B) allow the employee to a return to work with restrictions; or
 - (C) restricts the employee from returning to work.

Comment: Commentor asked what the form will look like, is the form going to be universally accepted and what if the form does not give sufficient information to the employer to appropriately place the employee? Commentor wanted to know whether the form had permanent restrictions identified on the form. The commentor suggested that it is difficult to evaluate the time frames without knowing what the form looks like and how long it will take the doctor to complete it. Another commentor suggested that system participants should have an opportunity to comment on the new report.

Response: The Work Status Report will be a required report and all doctors will be required

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to use the standardized form. It is difficult to create one form that will completely satisfy everyone. Some will find it more detailed than they are used to. Others will find it less detailed than they think it should be. However, when drafting the form we are trying to be guided by several ideas: 1) it should be simple enough that the doctor can fill it out in a few minutes during the examination; 2) it should present, in a simple manner, enough information for an employer to be able to understand the restrictions placed on the employee so that the employer can attempt to accommodate those restrictions; and 3) it should provide information that the carrier can use for claim management for indemnity benefit delivery.

The report is expected to be a simple form with three main parts as follows: The first part is for identifying information on the employee and transmittal information (name, date of injury, date of examination, insurance carrier name, carrier facsimile number, etc.). The second section is where the doctor will indicate whether the employee's condition has improved sufficiently to allow the employee to return to work. The current draft includes three choices: able to return without restriction, able to return with restrictions and unable to return. The doctor indicates the employee's work status by checking the box and filling in a few blanks that help claim management. For example, if the employee has been released to return to work at modified duty, the doctor will also indicate how long the restrictions are expected to last. The third part of the form is where a doctor will indicate what restrictions apply in the case of an employee being released to return to work with restrictions. The current draft of the report has this section including a variety of restriction types using check boxes. Common restrictions on the report include: lifting, posture, motion, and general restrictions. All of these restrictions are printed on the form with check boxes for the doctor to fill out. There is also a place for the doctor to use free text to add other restriction information which may not be on the form already.

The Commission has been working with system participants from all parts of the system to develop the form and they have indicated that the draft appears to be easy to fill out, easy to understand, and provides the information necessary to encourage return to work at modified duty and make decisions about paying benefits. In addition, based on their feedback, additional boxes were added to the form because health care providers indicated that they would rather have more choices on the form to make it faster to fill out than have to use a lot of free text to fill in restrictions. If it turns out that after its introduction, system participants have ideas about how to improve the report, the report can be modified to make these improvements. Because this is a new report, the current draft of the form includes a space at the bottom for doctors to put additional information which they have found useful in the past. This will allow those doctors who have been using their own report for some time to add elements to the Commission's report to enhance its use.

Comment: Commentor asked what happens when permanent restrictions are assigned wondering whether the provider would still have to send the report.

Response: The current draft of the report was not designed specifically with permanent

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restrictions in mind. Permanent restrictions are generally assessed at maximum medical improvement (MMI). The expectation is that this report will primarily be used prior to maximum medical improvement (with some limited use in SIBs claims). However, the doctor is not prevented from indicating that the restrictions are permanent on the report.

Comment: Commentor asked what the penalty was for failing to file the report.

Response: The maximum penalty for this or any other violation is dependant on a number of factors outlined in the statute. Continued noncompliance by a doctor can lead to penalties of up to \$10,000 and even removal from the approved doctor list. The Commission has chosen to not put enforcement language into the rule because to do so would be redundant to the statute and could require all rules to have several paragraphs outlining possible enforcement actions that can result from noncompliance. Failure to comply with any rule or portion of the statute may result in enforcement action being taken as authorized by various provisions of the statute.

Comment: Commentor suggested that the Work Status Report be limited to reporting the injured worker's abilities to perform physical functions rather than duplicating information concerning medical diagnosis or treatment which the physician now sends to the carrier.

Response: Commission agrees and believes that the rule does this.

Comment: Commentor suggested that the report should relate to the ability to perform physical functions and not provide medical diagnosis or treatment information as this will reduce duplication of information and improve timely faxing of report.

Response: Commission agrees and believes that the rule does this.

Comment: Commentor suggested that the estimated release times should be targets and should be changeable.

Response: Commission agrees. The intent of providing estimated expirations for restrictions (whether modified duty restrictions or complete restriction from all work) is to promote return to work by making the evaluation of the duration of restrictions of the process of assigning the restrictions. Further this can aid in determining whether the employee continues to have disability in a period in which the employee has abandoned or does not need continuous medical treatment. However, an estimated expiration is speculative in nature. The further out the date is projected, the less accurate it may be. To emphasize this point, the language referring to the estimated duration of restrictions has been separated into its own subsection and supplemented with language to ensure that the nature of an estimate is not misunderstood. In addition, other language relating to who the report must be filed with was removed as redundant to other language in the rule. The changes are as follows:

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- (b) The doctor shall file a Work Status Report in the form and manner prescribed by the Commission which indicates the employee's current work status, including the job functions the employee is able to safely perform as well as any specific restrictions on the employee's activities, if any.
- (c) The doctor believes that the employee's medical condition will not allow the employee to return to work without restriction, the Work Status Report shall include the date that the restrictions on or restrictions from work are expected to expire. An expected expiration date is not binding and may be adjusted as appropriate based on the condition and progress of the employee in future Work Status Reports.

Comment: Several commentors suggested that the report only be given to the carrier and the employee. The commentors believed that the employer should have to obtain this information from the carrier or employee. The commentors expressed concern that filing the reports with four parties would increase paperwork and costs and that only having to provide it to two people would save time and money. The commentors contended that this was particularly true if people would have to stand over the facsimile machine waiting to get through and suggested that not all small employers have facsimile machines yet. The commentors also stated that not all carriers have facsimile capacity yet either. The commentors also stated that even when employers have facsimile machines, neither the carrier nor the employee know the number. The commentors also stated that the "[e]mployer has hired carrier to handle workers' compensation issues. Employer should get information from the carrier or claimant."

Other commentors indicated that the employer should definitely receive the Work Status Report from the doctor. A number of commentors expressed concern that employers and carriers don't get the form quickly enough and stated emphatically that the report should be sent to the employer and carrier on the date of the examination.

Response: Commission agrees that the proposed filing requirements should be modified but disagree that the Work Status Report should be sent only to the carrier and employee. It is true that for many employers, the carrier functions as the employer's expert and adviser on workers' compensation matters. This is particularly true in the case of smaller employers that have few if any work related injuries. In these cases, sending the report to the carrier and having the carrier call the employer to help the employer set up a modified duty offer is a good idea.

However, there are also employers in the system who are experienced in return to work matters; often having programs set up to accommodate early return to work. These employers would be in more of a position to react to the Work Status Report without help from their carriers. In addition, these employers are more likely to have facsimile machines to receive a report from the doctor.

The concern that the doctor might have difficulty obtaining the employer's facsimile number or

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email address is one that has been brought up in comments on other rules that had similar filing requirements. Therefore, the language of the rule which requires use of facsimile or email has been modified to require transmission in this manner if the doctor has been provided with a facsimile number or email address.

With regard to the commentors' assertion that many carriers don't have a capacity to receive facsimiles, carriers are now required to maintain facsimile machines. This rule was developed with a reasonable evaluation of the available facsimile and electronic transmission technology. Machines that can be programmed to send a document to multiple places are not uncommon or unreasonably expensive.

A facsimile transmission can also be performed through a computer modem which could be obtained for less than \$30. Sending facsimiles by a computer modem also has the added benefit of greatly reducing staff time because the computer will keep retrying numbers that are busy and can skip between documents that are being sent so that a machine is not tied up while trying to get through to a specific number. In addition, there are facsimile transmission services available so that a doctor could email the report to the service with a list of facsimile numbers that the report is to be sent to and then the service sends it out by facsimile. This would greatly reduce the time and trouble the doctor would have filing the report.

The goals of the rule are to: encourage early returns to work that are meaningful and consistent with the employees' abilities; ensure that carriers have a good source of information regarding work status so that benefits can be timely started and stopped; and reduce calls to doctors by carriers looking for disability information as both carriers and doctors have identified that such calls are time-consuming and frustrating.

Given these goals, the employer needs to receive a copy of the report. Ultimately it is the employer that will create the modified duty offer if a position can be found which is consistent with the employee's release restrictions. Sending the Work Status Report to the carrier first requires the carrier to turn around and send it to the employer which delays the employer from making an offer of employment. Ultimately the result is a delay in the return to work which is counter to the intent of the rule.

The idea that the carrier is the employer's agent is a misconception and one which consistently causes problems in the system because not all carriers view themselves in that role nor are they required to. Though a carrier can assist the employer, some employers become so dependent on them that they forget that they have responsibilities in this system which are independent of their carriers.

This rule was drafted in large part based on the changes in the statute which required the Commission to develop a program "to encourage employers and treating doctors to discuss the availability of modified duty to encourage the safe and more timely return to work of injured

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employees." Keeping the employer directly engaged in the process by receiving the report directly from the treating doctor is consistent with this legislation.

However, it seems clear that meeting the goal of return to work does not require the employer receive regular reports that the employee's work status is unchanged. That is not to say that employer could not use additional information, it is to say that minimally, the employer only needs the reports that identify changes in work status as these are the ones which would affect return to work. Therefore, it is possible to reduce reporting requirements by not requiring the report to go to the employer unless there is a change in condition.

Looking at reporting requirements to the carrier, it is clear that the report is needed by the carrier even if the employee's condition has not changed because it can serve as a primary tool for determining whether an employee has disability and therefore is needed to timely initiate and terminate the payment of TIBs. The reporting requirements can not be lessened by removing the requirement to file the report with the carrier.

In reviewing this issue, the frequency of the reporting requirement was reviewed. Reporting work status to the carrier as often as once per week is more than is necessary when the employee's condition has not changed. Therefore, reporting requirements can be lessened by reducing the frequency of the reporting requirements from no more than once per week to no more than once per two weeks, unless the employee's work status has changed. This cuts the reporting requirements in half from what was proposed while not sacrificing the effectiveness of the rule. Changes in the rule have been made to reduce the frequency of reporting and to change reporting to the employer as outlined in this response.

Comment: A number of commentors insisted that the doctor should file the Work Status Report with the employer and the carrier on the date of the examination. They saw "no valid reason" the doctor should not provide the Work Status Report to the carrier and the employer on the same day as it is provided to the employee. Their reasoning for this is based in part on the fact that the doctor is required to give the employee a copy of the report at the time of the examination which means that it is available on that date. Several of the commentors emphasized the filing with the employer and several emphasized the filing with the carrier. Regardless of the emphasis, the commentors characterized the proposed filing requirements as creating "an unnecessary delay" which "runs counter to the ideas of an expedient return to work and reductions in contacts between parties."

Several other commentors suggested that the time frame for filing the report with the carrier and employer be changed to three working days to account for three day weekends.

Response: Commission agrees that the timeframe should be changed. With the changes in the rule which reduce reporting requirements so that most reports will only go to the carrier and employee, the reporting timeframe can be shortened. However, the timeframe should not be

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shortened to the date of the examination because if it were to take place late in the day, the doctor might not have the opportunity to timely transmit the report. Therefore, the timeframe has been changed to "one working day." This change also accounts for three day weekends that several commentors were concerned about.

Taken together, the two sets of comments (on where the report is filed and when it is filed) resulted in changes to subsections (d) (proposed as (b)) and (h) (proposed as (e)) and the addition of a new subsection (e) as follows:

- (d) The doctor shall file the Work Status Report after the initial examination of the employee, regardless of the employee's work status and shall file a new report for every subsequent appointment, but no more than once every two weeks, unless the employee's work status has changed, until the doctor releases the employee to return to work without restrictions. If, after releasing an employee to return to work the employee's unrestricted work status changes, the doctor shall begin and continue to file the Work Status Report as required by this subsection
- (e) The initial Work Status Report shall be filed with the carrier, employer, and employee. Subsequent Work Status Reports shall be filed with the carrier and employee and, if the employee's work status has changed, filed with the employer as well. The report shall be provided to the employee at the time of the examination and shall be sent within one working day from the date of examination to the carrier, and if applicable, the employer.
- (h) The doctor shall file the Work Status Report with the insurance carrier by facsimile or electronic transmission. The doctor shall file the report with the employer by facsimile or electronic transmission if the doctor has been provided the employer's facsimile number or email address; otherwise, the report shall be filed by personal delivery or mail.

Comment: Commentors noted that the use of facsimile or email is appropriate to communicate this information to both the employer and the carrier, should this form of communication be available to them.

Response: Commission agrees. As system participants expand their use of email, the doctor will be able to send the report to all parties with a single button push. Doctors could even set up their computers with all the necessary email addresses in them so that the doctor simply fills in the check boxes on the computer and as one is printed to hand to the employee, it is sent to the carrier, employer, etc. This will then greatly simplify filing of reports allowing them to be sent quicker, easier, and more economically.

Comment: Commentor suggested a minor change to proposed subsection (b) (now subsection (d)) to clearly indicate that the requirement for the doctor to begin filing the Work Status Report again requires the doctor to do so in the same manner as they are otherwise required to under this rule.

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Response: Commission agrees. This sentence to which the commentor was referring has been changed to read as indicated above.

Comment: Commentor suggested that "[t]he treating doctor should be required to certify that the injured worker is not impaired by the injury or by drugs prescribed wherein it would be unsafe to operate a motor vehicle on a public street or highway. The certification should include a statement that there are no side effects listed in the Physicians Desk Reference which would impair the operation of a motor vehicle. Public safety should supercede zealous return to work at any cost programs.

The use of prescription drugs at work is also not addressed. Injured workers suffer from drowsiness from prescription painkillers and are expected to work a full eight hour day and then drive home. The prescribing doctor should be held legally responsible for the safety of the injured worker and the public when the doctor returns an injured worker back to the workplace under the influence of painkillers and muscle relaxers.

Return to work restriction forms omit the issue of prescription drug usage and the treating doctor should be required to address these public safety issues."

Response: Commission agrees that a modified duty release must include consideration of the affects of medical treatment such as prescription drugs. The current draft of the Work Status Report form contains spaces for the doctor to indicate that the employee can't drive, operate heavy machinery, or work at heights as well as other activities that medication might affect. The draft form also has places to indicate that the employee must use crutches or wear sunglasses or wear a splint. If any of these requirements are factors that limit the employee's ability to work, the treating doctor should take them into account when evaluating the employee's work status.

Comment: Commentors asked how functional capacity examinations (FCEs) fit into this rule. The commentors noted that the Commission recently proposed a new list of items that would require preauthorization but felt that this proposed list did not clearly indicate whether an FCE would require preauthorization. The commentor asked whether FCEs require preauthorization. The commentor stated that if FCEs require preauthorization, then the three day time that it takes to get approval from the carrier would eliminate the possibility of getting the work status report completed within the three day period as stated in these proposed rule if an FCE is needed in order to provide appropriate restrictions on the Work Status Report.

Response: The treating doctor is not expected to do an FCE every time the doctor files a Work Status Report. The expectation is that the Work Status Report be filled out based on the doctor's experience with various types of injuries. Doing FCEs on a regular basis is not appropriate. The Commission's Medical Fee Guideline allows a maximum of three FCEs per employee. The FCE is more useful for the more severe injuries, particularly those which result in significant permanent restrictions. Further, if the doctor were required to do an FCE with every

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exam, per claim medical costs could increase dramatically since each FCE may be reimbursed several hundred dollars.

Because FCEs are not expected to be used in conjunction with this rule, the commentors' concern about the delay that obtaining preauthorization would create is not an issue.

Comment: Commentors noted that the rule does not discuss reimbursement for filing the Wage Status Report. Commentor thought that billing for the report on a HCFA-1500 would be grossly inefficient and suggested that \$5.00 be added to the reimbursement for an office visit. Another commentor suggested that §129.5 be changed to reference a \$15 per report reimbursement because "the development, data entry and submission of these reports involve the same type of costs associated with completing other TWCC reports . . . which is consistent with the reimbursements for the TWCC-69 and the TWCC-61 and 64 which this new form is proposed to take the place of."

Response: The Commission currently has a rule development team reviewing its Medical Fee Guideline and expects to recommend amendments to that guideline. These comments have been forwarded to that group for their review. The evaluation of the appropriate level of reimbursement for these reports, as with evaluation of the appropriate level of reimbursement for the office visits themselves will be performed by this group. However, it may be several months before a new fee guideline is adopted by the Commission and so staff reviewed the current reimbursement system in place and the premises on which it was based.

According to the preamble to the current Medical Fee Guideline, the reimbursement levels for evaluation/management codes (office visits) were calculated with consideration given to the fact that the workers' compensation system places an additional administrative burden on doctors. Specifically, the Commission noted in that preamble that these reimbursement levels were recalculated using the conversion factor for a higher percentile in order to address the additional administrative burden and the concern that if reimbursement levels did not account for the additional burden, primary care doctors would leave the system.

The type of report that this rule requires the doctor to file is an example of the type of additional administrative burden that the workers' compensation system places on doctors. However, it should be noted that even in nonworkers' compensation claims many doctors provide patients with modified duty slips. In addition, this report should be relatively easy to complete and the information required in the report is the type of information which doctors should already be collecting on a regular basis during office visits. Therefore, during this intermediate period between the effective date of this rule and the expected adoption of a new fee guideline, additional reimbursement for this report does not appear to be warranted. Although the current medical fee guideline was not developed with the Work Status Report in mind, it was developed with the expectation that providing care in the workers' compensation system carries additional administrative requirements of which this type of report is one.

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Further, considering that one of the legislative goals of the workers' compensation statute is the quick and safe return to work of employees injured on the job and the fact that the system places primary responsibility for accomplishing that goal on the treating doctor, this type of reporting should have been happening in the system all along. Indeed, it appears that in many cases it has been occurring in a variety of ways. As indicated by another commentor, many doctors created their own forms to report the information on a regular basis and those that did not, often ended up reporting it anyway by telephone when the carriers called for work status information.

Therefore, pending the amendment of Medical Fee Guideline, in which this issue may be revisited, filing of the Work Status Report will not be separately reimbursed. A new Medical Fee Guideline may or may not change this.

Comment: A number of commentors commented on proposed subsection (c) (now subsection (f)) and indicated that doctors are not experts in evaluating the requirements of a given job. Their suggestion was that the doctor should merely identify the employee's limitations and then let the employer ascertain whether or not the job being offered fit within these limitations.

Response: Commission agrees in part. The process should be that the doctor provides the restrictions and the employer puts together a job offer that meets these restrictions if they are willing and able to offer such a position. However, the part of the proposed subsection which allows the employer to provide a functional job description to the doctor for review was intended to address the situation where the employee has been completely off work for an extended period of time. This option is intended to facilitate communications between the treating doctor and the employer to allow an employer to initiate return to work ideas in a proactive manner. There are clearly claims in which an employee is completely unable to return to work in any capacity for extended periods. However, there may also be situations where the employee has been off work for so long that a fresh perspective may help identify opportunities for a return to work which the doctor would not know about. Regardless, it seems clear that for effective communication on return to work to be achieved, this communication needs to be a two way street and the employer needs to have the opportunity to initiate a dialog. At the same time, requiring the employer to come forward with functional job descriptions to initiate this dialog helps ensure that employers are really interested in providing a modified duty position and have thought through their ability to do so before talking to the doctor.

In addition, it was noted that with the changes being made in the reporting requirements as indicated above, this subsection needed a minor change in order to clearly indicate who the treating doctor has to respond to should the doctor be provided with functional job descriptions to review. Therefore, changes were made to this subsection to ensure that the carrier, employer, and employee receive copies of the doctor's report.

Rule 129.6 - Bona fide Offers of Employment

ADOPTED NEW §§129.1-129.3 and §§129.5-129.7

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Comment: Commentors providing input on this rule as well as the required medical examination (RME) rules in Chapter 126 (relating General Provisions Applicable to All Benefits) strongly stated that bona fide offers of employment should not be limited to releases of treating doctors. One of the commentors stated that "[t]he entire system recognizes the possibility of unequal treatment by providers from either side of a dispute. To give the treating doctor an absolute control of restricted return to work is counter to the spirit of what the Commission is about, the fair and impartial treatment of all parties." The commentor indicated that "[t]here are medical providers that advertise on the basis of keeping the employee off work."

Another commentor expressed concern as well because carriers "sometimes have problems with treating doctors who absolutely refuse to consider any release to return to work, even greatly restricted and modified duties. [Commentor] recognizes that the TWCC may be reluctant to allow a bona fide offer to be triggered by a non-treating doctor's opinion. However, there may be a reason for the TWCC to at least leave itself the option of obtaining an opinion through a TWCC-initiated RME for the purpose of obtaining an opinion on ability to work that could also serve as the basis for a bona fide offer."

Response: Commission agrees. An offer of employment should be able to be a bona fide offer even if it is not based on the treating doctor's opinion. Some of the commentors' concerns are valid and others seem to be based on a misconception of the way the new rule functions that was exhibited by several commentors.

The new §129.6 does not govern how the Commission evaluates an offer of employment to determine whether it is bona fide. The new rule sets out the conditions under which a carrier may evaluate a modified duty offer to determine whether it is bona fide. Nothing in the rule prevents or prohibits either the carrier or the employee from disputing the outcome of the operation of this rule. This rule was designed to permit carriers to suspend benefits without requesting dispute resolution under some circumstances, which the prior rule did not explicitly permit (although carriers did so anyway).

However, the commentors are correct in that the rule should allow the carrier to deem an offer of employment bona fide based on the RME doctor's work restrictions under some circumstances. In the absence of another medical opinion (preferably from the treating doctor), the carrier should be able to deem an offer of employment to be bona fide if it was based on the RME doctor's restrictions and otherwise was in compliance with the rule. Therefore, the rule has been modified to set out an order of preference for restrictions in the following new subsection (f):

- (f) The following is the order of preference that shall be used by carriers evaluating an offer of employment:
 - (1) the opinion of a doctor selected by the Commission to evaluate the employee's work status;

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- (2) the opinion of the treating doctor;
- (3) opinion of a doctor who is providing regular treatment as a referral doctor based on the treating doctor's referral;
- (4) opinion of a doctor who evaluated the employee as a consulting doctor based on the treating doctor's request; and
- (5) the opinion of any other doctor based on an actual physical examination of the employee performed by that doctor.

Comment: Commentor suggested reordering proposed subsections (a) and (b) which would shorten them by removing redundant language.

Response: Commission agrees. The subsections have been reversed and revised. Subsection (a) was changed as follows and subsection (b) was modified based on this suggestion and the previous comment that would allow an offer to be made based on another doctor's opinion:

- (a) An employer or insurance carrier (carrier) may request the treating doctor provide a Work Status Report by providing the treating doctor a set of functional job descriptions which list modified duty positions which the employer has available for the injured employee (employee) to work. The functional job descriptions must include descriptions of the physical and time requirements of the positions.
- (b) An employer may offer an employee a modified duty position which has restricted duties which are within the employee's work abilities as determined by the employee's treating doctor. In the absence of a Work Status Report by the treating doctor an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor.

Comment: Commentor expressed concern that an employer might "offer" a job within the employee's restrictions but then require the employee to do more than his/her abilities and thus increase the injury. The commentor stated that he had seen this on occasion and suggested that there be a penalty for an employer who offers a job that meets the restrictions but then forces or badgers the employee to do more than the job description or Work Status Report allowed.

Response: As noted, nothing in this rule prevents the employee from disputing the carrier's deeming an employer's offer of employment as being bona fide. Even if a carrier deemed an offer of employment to be bona fide in full compliance with this rule, the Commission can find that the offer is not bona fide. Again, this rule is designed to set up the conditions under which the carrier can deem an offer of employment to be bona fide in the absence of a findings by the Commission. Given the confusion on this point, the rule has been modified to state more clearly that the carrier may deem the offer to be bona fide in the absence of a Commission finding to the contrary.

Adopted new and repealed rules in Chapter 129 (Temporary Income Benefits). Adopted by the Commission at the December 2, 1999 public meeting and scheduled to be published in the December 17, 1999 issue of the Texas Register.

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Regarding the suggestion that the rule carry a penalty for employers who offer one job and then force the employee to do more than the job requires, employers need to be aware that Texas Labor Code, §415.008, provides that a person commits a violation if that person, to obtain or deny a payment of a workers' compensation benefit or the provision of a benefit for the person or another, knowingly or intentionally: makes a false or misleading statement, misrepresents or conceals a material fact; fabricates, alters, conceals, or destroys a document; or conspires to commit one of these acts. Further the section provides that an employer who has committed such an act that results in the denial of payments is liable for the past benefit payments that would have otherwise been payable by the carrier during the period of the denial plus interest and the carrier is not liable for the payment during that period.

The Commission is committed to helping to ensure that employees return to work quickly by providing mechanisms such as this rule. However, this commitment is to the employee returning to work that is within the employee's ability to work not to return the employee to work without regard to the employee's condition. Abuse of these mechanisms will carry consequences so system participants need to operate within the intent of these rules.

Comment: Commentor stated "[t]here is no valid reason to wait eight days to take action to deem wages. Wages should be deemed from the effective date of the bonafide offer."

Response: Commission agrees that the period before wages can be deemed to be PIE should be adjusted but disagrees with the suggestion that it be immediately. As indicated in the preamble that was published with the proposal of the Chapter 129 rules, the purpose of the seven day period was to account for mail time and to allow the employee the opportunity to discuss the offer with the treating doctor if the employee had concerns about it. For example, the employee might be familiar with the position that the employer was offering and know it to be a more strenuous position than the employer was implying. On the other hand, if the employee immediately indicates that the he/she is not going to accept the offer, there is no reason why the carrier should not be able to deem other offered wages as PIE on that rejection because that is consistent with the statute and this subsection has been changed reflect that in conjunction with changes being made based on the next set of comments.

Comment: Commentor stated that preference for electronic transmission should not preclude the validity of notification by any other means. Another commentor asked what a bona fide job offer form would look like. The commentor asked whether it would have the necessary information and whether it should be sent by certified mail. Commentor suggested that the form clearly identify potential impact on benefits.

Response: Commission agrees. The purpose of requiring the report to be sent by facsimile or electronic transmission was to speed up the return to work by removing delays caused by mail time. This is the same reason that the doctor is required to file the Work Status Report by facsimile or electronic transmission. Further, facsimile and email are more verifiable than regular

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mail. The proposed language dealing with transmission of the offer is similar to language proposed in other rules that commentors were concerned about. Specifically, commentors have been concerned about having to file reports or notices electronically or by facsimile if they have not been given a facsimile number or email address.

In addition, as noted in the prior comment, some commentors have expressed concerns about the amount of time that a carrier had to wait in order to deem wages that would have been earned as part of the offer to be PIE. Rather than specifying the means by which the offer needs to be sent, the rule has been revised to set out when the carrier will be permitted to deem the wages offered as PIE based on when it was received by the employee. This will provide an incentive to send it by facsimile or electronic transmission or personal delivery because these methods will result in being able to deem the wages as PIE sooner..

In regard to the format that an offer must take, as a result of reviewing comments on this rule and HB 2511, which requires the Commission to reduce the amount of paper which is required to be filed, staff has changed the rule to not require a form but rather to list the elements which must be included in an offer. Unlike the Work Status Report, it does not appear that having a single required form would greatly enhance the process.

During the proposal of this rule Commissioner Moore raised a concern about the situation in which the employee might be offered a position he or she is unable to successfully perform based on training or educational issues and suggested that this issue be reviewed during the evaluation of public comments and changes were made to address this situation as well as the others mentioned.

The revised subsections read as follows:

- (c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the Commission. A copy of the Work Status Report on which the offer is being based shall be included with the offer as well as the following information:
 - (1) the location at which the employee will be working;
 - (2) the schedule the employee will be working;
 - (3) the wages that the employee will be paid;
 - (4) a description of the physical and time requirements that the position will entail; and
 - (5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.

- (d) A carrier may deem an offer of modified duty to be a bona fide offer of employment if:

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- (1) it has written copies of the Work Status Report and the offer; and
- (2) the offer:
 - (A) is for a job at a location which is geographically accessible as provided in subsection (e) of this section;
 - (B) is consistent with the doctor's certification of the employee's work abilities, as provided in subsection (f) of this section; and
 - (C) was communicated to the employee in writing, in the form and manner prescribed by the Commission and included all the information required by subsection (c) of this section.

- (g) A carrier may deem the wages offered by an employer through a bona fide offer of employment to be Post-Injury Earnings (PIE), as outlined in §129.2 of this title (relating to Entitlement to Temporary Income Benefits), on the earlier of the date the employee rejects the offer or the seventh day after the employee receives the offer of modified duty unless the employee's treating doctor notifies the carrier that the offer made by the employer is not consistent with the employee's work restrictions. For the purposes of this section, if the offer of modified duty was made by mail, an employee is deemed to have received the offer from the employer five days after it was mailed. The wages the carrier may deem to be PIE are those that would have been paid on or after the date the carrier is permitted to deem the offered wages as PIE.

Comment: Commentor suggested that the rule specify a number of miles rather than simply require that the job be "geographically accessible." Other commentors suggested that the proposed language be amended to include in the definition of "geographically accessible" the location the employee normally worked at the time of injury or other locations of equal distance. One commentor suggested that subsection (e) be changed to read:

- (e) Employment is "geographically accessible" to the injured employee if it is within a reasonable distance from the employee's residence unless the employee establishes through medical evidence that the employee's physical condition precludes travel of that distance. An offer of employment is presumed to be within a reasonable distance if it is within the same distance the employee normally traveled to work at the time of injury.

Response: Commission agrees that the definition of geographically accessible could be clarified but disagrees with the specific suggestions. Geographic accessibility is partially based on the availability of transportation, particularly if the employee does not have a car or has restrictions that would keep him/her from driving. Therefore, a distance that would be considered geographically accessible in a location with extensive public transportation might not be considered accessible in another setting. Geographic accessibility must account for the employee's ability to reach the location. Further, the language of proposed subsection (e) was quite different from the rest of the language in the rule. The rule was designed to function as a

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guide to the carrier's behavior in this matter and should express what the carrier is permitted or required to do. To address these concerns subsection (e) was modified as follows:

- (e) In evaluating whether a work location is geographically accessible the carrier shall at minimum consider:
 - (1) the affect that the employee's physical limitations have on the employee's ability to travel;
 - (2) the distance that the employee will have to travel;
 - (3) the availability of transportation; and
 - (4) whether the offered work schedule is similar to the employee's work schedule prior to the injury.

To further emphasize this point, another subsection was added to the rule which specifies that the employee may dispute the carrier's action in deeming an offer to be bona fide and a carrier may raise an issue to a BRC if the rule does not allow the carrier to deem an offer to be bona fide but the carrier believes that it has evidence that suggests that it is bona fide. This new subsection (h) reads as follows:

- (h) Nothing in this section should be interpreted as limiting the right of an employee or a carrier to request a benefit review conference relating to an offer of employment. The Commission will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of this section.

Comment: Commentor asked what happens if the carrier does not agree with the treating doctor and the offer made by the employer is consistent with the employee's work restrictions.

Response: Nothing prevents a carrier from disputing the existence of disability at any time. However, such a dispute is more likely to be successful if the carrier has a medical opinion on the employee's work status than if the carrier merely disagrees with the treating doctor's restrictions. Further, a carrier is not allowed to deem an offer of employment to be bona fide if it not based on a doctor's opinion.

Comment: Commentor suggested that the requirement that the offer of modified duty not include a copy of the Work Status Report. The commentor stated that if the employer does not receive a copy of the report it would cause difficulties and recommended that this requirement be removed.

Response: Commission disagrees. This rule is designed to set out conditions under which a carrier can deem an offer of employment to be a bona fide offer. Without a Work Status Report, it is not clear how the employer could put together an offer which is consistent with the employee's ability to work. Allowing an offer of employment to be deemed to be a bona fide

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offer in the absence of a medical opinion about what the employee can safely do could easily lead to employees aggravating their injuries. This may be especially true since the employee may feel pressured to return to work because failure to accept a bona fide offer may result in a reduction or termination of TIBs. If an employer, or anyone else, is not receiving a copy of the Work Status Report as required by §129.5, the person should contact the Commission for assistance in obtaining the report.

Rule 129.7 - Non-Reimbursable Employer Payments

Comment: Commentor suggested that the rule was overly broad. The commentor stated that "[HB-2842] bars recoupment only if the payment of salary continuation is pursuant to contractual obligation. Although it should not be a frequently recurring problem, an employer may extend salary continuation as an intended benefit payment [without a] contractual obligation. In that event, it should be entitled to reimbursement. Rule 129.7 should track the statutory language proposed in [HB-2842]." Another commentor opined that "[t]his rule effectively eliminates any carrier reimbursement of long-term salary continuation, since §126.13 only allows reimbursement of "salary initiation" paid for the 7-day period before the carrier has accepted liability. This is likely to discourage salary continuation where the employer is not obligated by contract to provide it. This may be counterproductive, as it provides a disincentive to employers who wish to continue full salary but who wish later to be reimbursed from TIB and IIB."

Response: Commission disagrees. Under §129.2, salary continuation is a form of PIE. As such, the employer should not be allowed to be reimbursed for these earnings. An employer is not able to seek reimbursement from the carrier if the employer pays an employee wages while on modified duty or if the employer continues to provide health insurance (both of which affect the amount of an employee's TIBs). There is no reason to set up a dual standard for reimbursements.

Further, the new statutory language does not merely refer to salary continuation paid pursuant to a contractual arrangement, it also refers to salary continuation made pursuant to a policy or agreement. Because employers are not required to make salary continuation payments, other than perhaps by contractual arrangement, these are payments must be made due to some kind of agreement or policy and therefore the new provisions of HB-2842 apply.

Also, the commentor's reference to §126.13 is not entirely correct. The rule allows the employer to begin the payment of benefits during a period in which the carrier has not accepted or been found liable for a claim. In a period in which the carrier is actively denying a claim, this period can be far longer than the seven days cited by the commentor.

STATUTORY AUTHORITY FOR REPEALS

The repeals are adopted under following statutes: Texas Labor Code, §401.024, as amended by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code,

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§402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, §408.003, as amended by the 76th Texas Legislature, which allows an employer to initiate benefits or to pay salary continuation; Texas Labor Code, §408.004, which addresses required medical examinations and the affect of a carrier selected doctor's opinion of payment of TIBs; Texas Labor Code, §§408.041, 408.042, 408.043, and 408.044, which address calculation of the AWW for different types of employees; Texas Labor Code, §408.045, which addresses the effect of non-pecuniary wages on the calculation of AWW; Texas Labor Code, §408.047, which defines the state average weekly wage which is used to calculate maximum and minimum weekly benefit rates; Texas Labor Code, §408.061, which addresses the maximum weekly benefit rate; Texas Labor Code, §408.062, which addresses the minimum weekly benefit rate; Texas Labor Code, §408.063, which requires the employer to provide a wage statement; Texas Labor Code, §408.081, which provides that, except as otherwise provided, benefits are to be paid weekly as and when they accrue; Texas Labor Code, §408.082, which addresses entitlement to income benefits; Texas Labor Code, §408.101, which addresses entitlement to TIBs; Texas Labor Code, §408.103, which outlines how the amount of TIBs is to be calculated and addresses that the wages offered as part of a rejected bona fide offer of employment are considered post injury earnings; Texas Labor Code, §408.105, as amended by the 76th Texas Legislature, which allows TIBs to be offset by salary continuation; Texas Labor Code, §409.021, which requires carriers to timely initiate or dispute compensation; Texas Labor Code, §409.023, which requires carriers to pay benefits as and when they accrue; and Texas Labor Code, §413.018 as amended by the 76th Texas Legislature, which requires the Commission develop a program to encourage employers and treating doctors to communicate about modified duty offers.

§129.1. Definitions for Temporary Income Benefits Calculation.

§129.2. Calculation of Temporary Income Benefit for Employees Who Earn Less Than \$8.50 per Hour.

§129.5. Bona Fide Offers of Employment.

STATUTORY AUTHORITY

The new rules are adopted under following statutes: Texas Labor Code, §401.024, as amended by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.010, which authorizes the Commission

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to adopt rules regarding claims service; Texas Labor Code, §408.003, as amended by the 76th Texas Legislature, which allows an employer to initiate benefits or to pay salary continuation; Texas Labor Code, §408.004, which addresses required medical examinations and the affect of a carrier selected doctor's opinion of payment of TIBs; Texas Labor Code, §§408.041, 408.042, 408.043, and 408.044, which address calculation of the AWW for different types of employees; Texas Labor Code, §408.045, which addresses the effect of non-pecuniary wages on the calculation of AWW; Texas Labor Code, §408.047, which defines the state average weekly wage which is used to calculate maximum and minimum weekly benefit rates; Texas Labor Code, §408.061, which addresses the maximum weekly benefit rate; Texas Labor Code, §408.062, which addresses the minimum weekly benefit rate; Texas Labor Code, §408.063, which requires the employer to provide a wage statement; Texas Labor Code, §408.081, which provides that, except as otherwise provided, benefits are to be paid weekly as and when they accrue; Texas Labor Code, §408.082, which addresses entitlement to income benefits; Texas Labor Code, §408.101, which addresses entitlement to TIBs; Texas Labor Code, §408.103, which outlines how the amount of TIBs is to be calculated and addresses that the wages offered as part of a rejected bona fide offer of employment are considered post injury earnings; Texas Labor Code, §408.105, as amended by the 76th Texas Legislature, which allows TIBs to be offset by salary continuation; Texas Labor Code, §409.021, which requires carriers to timely initiate or dispute compensation; Texas Labor Code, §409.023, which requires carriers to pay benefits as and when they accrue; and Texas Labor Code, §413.018 as amended by the 76th Texas Legislature, which requires the Commission develop a program to encourage employers and treating doctors to communicate about modified duty offers.

§129.1. Definitions for Temporary Income Benefits

The following terms shall have the following meanings unless the context clearly indicates otherwise:

- (1) Salary Continuation (also Wage Continuation) - Monies paid by the employer to compensate the injured employee (employee) for wages lost as a result of a compensable injury. Salary continuation does not include monies paid to an employee as compensation for work such as wages paid while an employee is on modified duty.
- (2) Salary Supplementation (also Wage Supplementation)- Monies paid by the employer to supplement the amount of income benefits an insurance carrier pays to an employee with a compensable injury. This includes monies paid to the employee based on the employee's voluntary use of sick leave or annual leave in a supplementary manner.
- (3) Weekly Earnings After the Injury - Post-Injury Earnings (PIE), further described in §129.2 of this title (relating to Entitlement to Temporary Income Benefits).

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§129.2. Entitlement to Temporary Income Benefits

- (a) Once temporary income benefits (TIBs) accrue, an injured employee (employee) is entitled to TIBs to compensate the employee for lost wages due to the compensable injury during a period in which the employee has disability and has not reached maximum medical improvement.
- (b) Lost wages are the difference between the employee's gross average weekly wage (AWW) and the employee's gross Post-Injury Earnings (PIE). If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages.
- (c) PIE shall include, but not be limited to, the documented weekly amount of:
 - (1) all pecuniary wages paid to the employee after the date of injury including wages based on work performed while on modified duty and pecuniary fringe benefits which are paid to the employee whether the employee has returned to work or not;
 - (2) any employee contribution to benefits such as health insurance that the employee normally pays but that the employer agrees to pay for the employee in order to continue the benefits (which does not include the portion of the benefits that the employer normally pays for);
 - (3) the weekly amount of any wages offered as part of a bona fide job offer which is not accepted by the employee which the insurance carrier (carrier) is permitted to deem to be PIE under §129.6 of this title (relating to Bona Fide Offers of Employment);
 - (4) the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury;
 - (5) the value of any partial days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury that, when combined with the employee's TIBs, exceeds the AWW; and
 - (6) any monies paid to the employee by the employer as salary continuation based on :
 - (A) a contractual obligation between the employer and the employee including through a collective bargaining agreement;
 - (B) an employer policy; or
 - (C) a written agreement with the employee.
- (d) PIE shall not include:

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- (1) any non-pecuniary wages paid to the employee by the employer after the injury;
- (2) any accrued sick leave or accrued annual leave that the employee did not voluntarily elect to use;
- (3) any wages paid by the employer as salary supplementation as provided by Texas Labor Code, §408.003(a)(2);
- (4) any moneys paid by the employer which would otherwise be considered PIE under subsection (c) of this section but which the employer attempts or intends to seek reimbursement from the employee or carrier; or
- (5) any money paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation.

§ 129.3. Amount of Temporary Income Benefits

- (a) The insurance carrier (carrier) shall pay an injured employee (employee) the temporary income benefits (TIBs) the employee is entitled to in accordance with this chapter.
- (b) The carrier shall determine whether the employee earns less than \$8.50 per hour as follows:
 - (1) Once the carrier has received the Wage Statement required by this title, the carrier shall divide the average weekly wage (AWW) calculated from the Wage Statement by the average number of hours worked. The average hours worked is the total gross hours reported worked on the Wage Statement divided by the period in which the hours were worked;
 - (2) If the carrier has not received the Wage Statement, but has received the Employer's First Report of Injury, the carrier shall use the wage information provided by the employer through the first report; or
 - (3) If the carrier has not received the information necessary to perform the calculations required by subsection (b)(1) or (2) of this section, the carrier shall use wage information provided by the employee until the necessary information is obtained from the employer.
- (c) The carrier shall calculate the AWW in accordance with Chapter 128 of this title (relating to Calculation of Average Weekly Wage) and shall calculate the Post-Injury Earnings (PIE) in accordance with §129.2 of this title (relating to Entitlement to Temporary Income Benefits). In determining the PIE, the carrier shall base its calculations on specific wage information reported by the employer and/or the employee. A generic statement by the employer indicating the employer is "continuing full salary" or "the employee is earning full salary" is not adequate documentation to be considered PIE.

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- (d) The carrier shall calculate the employee's lost wages by subtracting the PIE from the AWW (or AWW - PIE).
- (e) The amount of TIBs an employee is entitled to is based on the lost wages. If the employee's PIE equals or exceeds the employee's AWW, the employee has no lost wages and the carrier shall not pay TIBs.
- (f) Subject to the minimum and maximum TIBs rates as provided in subsection (g) of this section, an employee is entitled to TIBs as follows:
 - (1) an employee who earns \$8.50 or more per hour is entitled to TIBs in the amount of 70% of the lost wages; or
 - (2) an employee who earns less than \$8.50 per hour is entitled to TIBs as follows:
 - (A) 75% of the lost wages for the first 26 weeks of TIBs due; and
 - (B) 70% of the lost wages for all TIBs payments thereafter.
- (g) The carrier shall pay the TIBs in the amount calculated in subsection (f) of this section, unless:
 - (1) this amount is greater than the maximum weekly TIBs rate computed in accordance with Texas Labor Code, §408.061, in which case the carrier shall pay the maximum weekly TIBs rate; or
 - (2) this amount, when added to the employee's PIE, is less than the minimum weekly TIBs rate computed in accordance with Texas Labor Code, §408.062, in which case the carrier shall pay the minimum weekly TIBs rate.

§129.5. Work Status Reports

- (a) As used in this section:
 - (1) the term "doctor" means either the treating doctor or a doctor to whom the treating doctor has referred the injured employee (employee) for regular treatment; and
 - (2) the term "work status" refers to whether the employee's medical condition will:
 - (A) allow the employee to return to work without restrictions;
 - (B) allow the employee to a return to work with restrictions; or
 - (C) restricts the employee from returning to work.

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- (b) The doctor shall file a Work Status Report in the form and manner prescribed by the Commission which indicates the employee's current work status, including the job functions the employee is able to safely perform as well as any specific restrictions on the employee's activities, if any.
- (c) If the doctor believes that the employee's medical condition will not allow the employee to return to work without restriction, the Work Status Report shall include the date that the restrictions on or restrictions from work are expected to expire. An expected expiration date is not binding and may be adjusted as appropriate based on the condition and progress of the employee in future Work Status Reports.
- (d) The doctor shall file the Work Status Report after the initial examination of the employee, regardless of the employee's work status and shall file a new report for every subsequent appointment, but no more than once every two weeks, unless the employee's work status has changed, until the doctor releases the employee to return to work without restrictions. If, after releasing an employee to return to work the employee's unrestricted work status changes, the doctor shall begin and continue to file the Work Status Report as required by this subsection.
- (e) The initial Work Status Report shall be filed with the carrier, employer, and employee. Subsequent Work Status Reports shall be filed with the carrier and employee and, if the employee's work status has changed, filed with the employer as well. The report shall be provided to the employee at the time of the examination and shall be sent within one working day from the date of examination to the carrier, and if applicable, the employer.
- (f) In addition, the treating doctor shall file the Work Status Report with the carrier, employer, and employee within seven days of the day of receipt of:
 - (1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or
 - (2) a required medical examination doctor's report that the employee can return to work.
- (g) Filing the Work Status Report as required by subsection (f) of this section does not require a new examination of the employee.
- (h) The doctor shall file the Work Status Report with the insurance carrier by facsimile or electronic transmission. The doctor shall file the report with the employer by facsimile or electronic transmission if the doctor has been provided the employer's facsimile number or email address; otherwise, the report shall be filed by personal delivery or mail.

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§129.6. Bona Fide Offers of Employment

- (a) An employer or insurance carrier (carrier) may request the treating doctor provide a Work Status Report by providing the treating doctor a set of functional job descriptions which list modified duty positions which the employer has available for the injured employee (employee) to work. The functional job descriptions must include descriptions of the physical and time requirements of the positions.
- (b) An employer may offer an employee a modified duty position which has restricted duties which are within the employee's work abilities as determined by the employee's treating doctor. In the absence of a Work Status Report by the treating doctor an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor.
- (c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the Commission. A copy of the Work Status Report on which the offer is being based shall be included with the offer as well as the following information:
 - (1) the location at which the employee will be working;
 - (2) the schedule the employee will be working;
 - (3) the wages that the employee will be paid;
 - (4) a description of the physical and time requirements that the position will entail; and
 - (5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.
- (d) A carrier may deem an offer of modified duty to be a bona fide offer of employment if:
 - (1) it has written copies of the Work Status Report and the offer; and
 - (2) the offer:
 - (A) is for a job at a location which is geographically accessible as provided in subsection (e) of this section;
 - (B) is consistent with the doctor's certification of the employee's work abilities, as provided in subsection (f) of this section; and
 - (C) was communicated to the employee in writing, in the form and manner prescribed by the Commission and included all the information required by subsection (c) of this section.

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- (e) In evaluating whether a work location is geographically accessible the carrier shall at minimum consider:
 - (1) the affect that the employee's physical limitations have on the employee's ability to travel;
 - (2) the distance that the employee will have to travel;
 - (3) the availability of transportation; and
 - (4) whether the offered work schedule is similar to the employee's work schedule prior to the injury.

- (f) The following is the order of preference that shall be used by carriers evaluating an offer of employment:
 - (1) the opinion of a doctor selected by the Commission to evaluate the employee's work status;
 - (2) the opinion of the treating doctor;
 - (3) opinion of a doctor who is providing regular treatment as a referral doctor based on the treating doctor's referral;
 - (4) opinion of a doctor who evaluated the employee as a consulting doctor based on the treating doctor's request; and
 - (5) the opinion of any other doctor based on an actual physical examination of the employee performed by that doctor.

- (g) A carrier may deem the wages offered by an employer through a bona fide offer of employment to be Post-Injury Earnings (PIE), as outlined in §129.2 of this title (relating to Entitlement to Temporary Income Benefits), on the earlier of the date the employee rejects the offer or the seventh day after the employee receives the offer of modified duty unless the employee's treating doctor notifies the carrier that the offer made by the employer is not consistent with the employee's work restrictions. For the purposes of this section, if the offer of modified duty was made by mail, an employee is deemed to have received the offer from the employer five days after it was mailed. The wages the carrier may deem to be PIE are those that would have been paid on or after the date the carrier is permitted to deem the offered wages as PIE.

- (h) Nothing in this section should be interpreted as limiting the right of an employee or a carrier to request a benefit review conference relating to an offer of employment. The Commission will find an offer to be bona fide if it is reasonable, geographically accessible, and meets the requirements of subsections (b) and (c) of this section.

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§129.7. Non-Reimbursable Employer Payments

- (a) An employer who pays an injured employee (employee) salary continuation is not entitled to and shall not seek reimbursement from the employee or the insurance carrier (carrier).
- (b) An employer who pays an employee salary supplementation to supplement income benefits paid by the carrier is not entitled to and shall not seek reimbursement from the employee or the carrier.