APPEAL NO. 91014

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 through 8308-11.10 (Vernon Supp. 1991). On July 3, 1991, a contested case hearing was held. The hearing officer concluded that claimant was a full-time temporary employee of Employer 1 (hereinafter "Employment Services") on _____, and sustained a compensable injury on that date, that a fair and just average weekly wage ("AWW") was $154.00, that claimant was eligible for temporary income benefits ("TIB's") from the date of her injury to April 17, 1991, payable at $154.00 per week, that claimant had not reached maximum medical improvement ("MMI"), and that claimant was eligible for TIB's from April 18, 1991 until claimant reached MMI or until December 31, 1993. The hearing officer determined that claimant was entitled to recover TIB's and ordered carrier to pay TIB's that had accrued and that would accrue to the date of receipt of the order in a lump sum, less amounts previously paid and as may be reduced pursuant to Article 8308-4.23(d) and (f), and ordered carrier to compute the appropriate amount of TIB's due each week to claimant and to pay those benefits until claimant has reached MMI or until December 31, 1993.

A Corrected Final Decision and Order (the "corrected decision") was issued in response to carrier's motion. The corrected decision corrected the amount of TIB's to $115.50 per week and the amount owed to claimant to April 18, 1991, less amounts previously paid, from $171.85 to $160.35. In all other respects, the corrected decision was the same as the original decision.

Both the claimant and the carrier have requested review of the hearing officer's decision. For clarity, the parties will be referred to as claimant and carrier since both assume the position of appellant on review.

The claimant contends that the hearing officer erred in: (1) finding that she was an employee of Employment Services instead of Employer 2 (hereinafter "Temporary Employer"); (2) finding that no probative evidence was introduced to establish an AWW based upon the AWW of a "same or similar employee"; and (3) holding that a "fair and just" AWW was $154.00.

The carrier contends that the hearing officer erred in: (1) finding that claimant had an AWW of $154.00; (2) finding that claimant was entitled to TIB's of $115.50 per week; (3) ordering carrier to pay TIB's from the date of receipt of the decision until either claimant has reached MMI or December 31, 1993; and (4) ordering carrier to pay TIB's from April 18, 1991 until date of receipt of the decision at the rate of $115.50 per week.

DECISION

We find merit in claimant's contention that she was an employee of Temporary Employer at the time of her injury, and was not an employee of Employment Services at the time of her injury as found by the hearing officer. However, since there was no finding that Temporary Employer was a subscriber to workers' compensation insurance, and if it was, whether the insurance was provided by carrier, we reverse the decision of the hearing officer and remand the cause to him for further consideration and development of evidence in accordance with our instructions contained herein.

Employment Services is a supplier of temporary labor. In December of 1990, claimant established a relationship with Employment Services for the purposes of getting temporary employment. On December 18, 1990, Employment Services assigned claimant to work as a taco packer at Temporary Employer. During the period December 18, 1990 through _____, claimant worked nine (9) days for Temporary Employer on the 4:00 p.m. to 12:00 a.m. shift. On _____, claimant sustained an inguinal hernia and an umbilical hernia when she tried to move a fully loaded pallet from near the conveyor belt with a hand pallet jack.

From December 18, 1990, when she reported to work at Temporary Employer through _____, the date of her injury, the night foreman, an employee of Temporary Employer, told claimant what her duties would be at Temporary Employer. On her first day of work he told her she would be a taco packer in the cooler area packing containers into a box, but on other days directed her to do other jobs such as making tacos and inspecting material. The day supervisor, who was also an employee of Temporary Employer, showed claimant how to pack tacos on her first day of work. On the day of her injury, the night shift was shorthanded so the night foreman put most of the workers on the taco line leaving only the claimant to make boxes, pack the tacos, and put the boxes on a pallet. Claimant testified that, to her knowledge, no one from Employment Services ever came out to her workplace at Temporary Employer and exercised any kind of control, management, or supervision over the details of her work.

Claimant immediately reported her accident to her night foreman who told her to call Employment Services the next morning, which she did. Employment Services told claimant she could go to their doctor or her own doctor. She went to her own doctors, who, after several weeks of unsuccessful therapy, diagnosed her injuries as hernias for which surgery was performed on February 18, 1991. The carrier in this proceeding, who is the workers' compensation insurance carrier for Employment Services, paid medical benefits incurred as a result of claimant's injury and paid claimant TIB's from January 3, 1991 to April 28, 1991.

The record reflects that, in addition to assigning claimant to work at Temporary Employer as a taco packer, Employment Services told her to dress comfortably for her job, set her rate of pay and told her what the rate was, paid her for the hours she worked at Temporary Employer, instructed her to notify Employment Services if she could not report to work (which she did when she missed work on December 28, 1990), withheld taxes and social security from her gross pay, and had workers' compensation insurance coverage through carrier. Employment Services also provided certain fringe benefits to its employees, but at the time of her injury, claimant had not been with Employment Services the required length of time to be entitled to those benefits. Employment Services charges a customer such as Temporary Employer, for its services in supplying temporary labor to the customer.

Claimant's original Notice of Injury and Claim for Compensation dated February 12, 1991, named Employment Services as her employer at the time of her injury. Claimant filed an Amended Notice of Injury and Claim for Compensation dated May 20, 1991, which named Temporary Employer as her employer at the time of her injury. The benefit review conference was held on May 7, 1991. At the inception of the contested case hearing, the hearing officer noted that one of the issues presented for resolution at the hearing was: who was claimant's employer on the date the alleged injury occurred? At the hearing, the carrier did not dispute that claimant suffered an injury at the time and in the manner

claimed. The carrier's position was that claimant was an employee of Employment Services and that, as Employment Services' carrier, it unconditionally accepted the compensability of claimant's injury. Claimant's position at the hearing was that she was an employee of Temporary Employer at the time of her injury. Carrier's attorney stated that, if claimant was Temporary Employer's borrowed servant, then no compensation would be due from carrier because it is not the workers' compensation carrier for Temporary Employer. No evidence was presented on whether or not carrier was Temporary Employer's carrier on the date of the injury, and no finding was made on this matter. The hearing officer concluded that claimant was a full-time temporary employee of Employment Services on _____, and that she sustained a compensable injury on that date. Accordingly, he ordered Employment Services' carrier to pay TIB's to claimant as summarized above.

In Producers Chemical Company v. McKay, 366 S.W.2d 220 (Tex. 1963), the Texas Supreme Court stated that if the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. In the instant case, since the record is silent as to any contractual provision for right of control of claimant as between Employment Services and Temporary Employer, right of control must necessarily be determined from the facts and circumstances reflected in the record.

We note two cases, Carr v. Carroll Company, 646 S.W.2d 561 (Tex. App.-Dallas 1983, writ ref'd n.r.e.) and Denison v. Haeber Roofing Co., 767 S.W.2d 862 (Tex. App.-Corpus Christi 1989, no writ), which address the issue of borrowed servant where the injured employee was the general employee of a supplier of temporary labor, but was injured while working for the temporary employer to which he was assigned. In Carr, an employee of a supplier of temporary labor sued his temporary employer for injuries sustained as a result of negligence of an employee of the temporary employer when the injured employee fell off the prongs of a forklift while riding the forklift on the temporary employer's premises. The temporary employer invoked the exclusive remedy provision of the workers' compensation law asserting that the injured employee could not sue it for negligence because it had workers' compensation insurance and the employee was its borrowed servant at the time of his injury. The court stated that Texas courts have long recognized that a general employee of one employer may become the borrowed servant of another and that the central inquiry becomes which employer had the right of control of the details and manner in which the employee performed the necessary services. In holding that the evidence was sufficient to support the submission of the borrowed servant issue to the jury, the court noted that the area manager for the supplier of temporary labor testified that on-the-job supervision of the temporary employee was up to the company where the employee performed his services, a supervisor for the temporary employer testified that he directed the injured employee in the details of his work on the day of the accident, the injured employee testified that the work he carried out was supervised by the temporary employer's employees, and an employee of the temporary employer testified that he instructed the injured employee to get on the forklift to ride over to another location. The court upheld the jury finding that the injured employee was a borrowed employee of the temporary employer at the time of his injury and found that there was proof that it had workers' compensation insurance. Therefore, the temporary employer was protected from a common law negligence suit under the exclusive remedy provision of the workers' compensation law. The court noted that the injured employee's acts may have been in obedience to the general instructions of the supplier of temporary labor to perform whatever

manual labor the temporary employer directed him to do, but were within the normal scope of the temporary employer's business and were supervised in their details by the temporary employer's employees. The fact that the workers' compensation carrier for the supplier of temporary labor paid workers' compensation benefits to the injured employee did not enter into the court's analysis and determination of the borrowed servant issue.

In Denison v. Haeber Roofing Co., supra, a temporary worker hired from a temporary employment agency sued the temporary employer for negligence resulting in the worker's falling through a roof and sustaining injuries. The workers' compensation insurance carrier for the temporary employment agency had paid workers' compensation benefits to the injured worker. The temporary employer moved for summary judgment asserting that the injured worker was its "borrowed servant," that it was a workers' compensation subscriber, and that, therefore, it was not liable to the injured worker for its negligence under the exclusive remedy provision of the workers' compensation law. In an affidavit, the temporary employer's president stated that the injured worker was, at all times in question, under the direction and control of its foreman, that it supplied all tools and equipment, that it was a subscriber under Texas workers' compensation laws, and that there was no written contract between the temporary employer and the temporary employment agency. In contending that he was not the temporary employer's borrowed servant, the injured worker asserted that he received workers' compensation benefits from the temporary employment agency rather than through the temporary employer, and that the temporary employer refused to accept employer responsibility for him at the time of the injury. The court stated that since the temporary employment agency and the temporary employer had no written contract, the circumstances determine who had the right of control and was the employer. In affirming the summary judgment for the temporary employer and thereby holding that the evidence supported a finding that the injured worker was a borrowed servant of the temporary employer at the time of his injury, the court noted that the temporary employer provided the worker his tools, told him what to do on the jobsite, controlled his hours, told him when to take lunch break, and supervised what he was doing when he was injured, and that the temporary employment agency did not provide guidance or supervisory personnel on the jobsite. In addressing the worker's argument that the workers' compensation payments are a factor in determining whether he was a borrowed servant, the court stated that the focus in determining the status of employer/employee is on the right of control, not who may or may not have carried workers' compensation insurance or gratuitously paid compensation benefits. The court also held that the temporary employer's post-accident conduct in refusing to call an ambulance or use the company truck to take the injured worker to the hospital after his fall and in telling him he was not their employee, was irrelevant to whether the injured worker was under the temporary employer's control and supervision when he fell.

In our view, the circumstances of the case under consideration, wherein the evidence shows that claimant was supervised in the details and manner of her work by employees of Temporary Employer at the time of her injury, and was not being supervised as to the details and manner of her work by Employment Services, conclusively establishes under the holdings in Carr and Denison, supra, that Temporary Employer had the right of control over claimant in the manner of performing her services and, thus, was Temporary Employer's borrowed servant at the time of her injury.

In support of the hearing officer's conclusion that its insured, Employment Services, was claimant's employer at the time of her injury, carrier argues that without evidence that

Temporary Employer had workers' compensation insurance coverage, the hearing officer could not find that Temporary Employer was an "employer" within the 1989 Act as that term is defined in Article 8308-1.03(19). While carrier's argument has merit in that there is no evidence in the record that Temporary Employer had workers' compensation insurance, that point is not relevant to the borrowed servant issue. The focus in determining the status of employer/employee is on the right of control, not who may or may not have carried workers' compensation insurance or gratuitously paid compensation benefits. Denison v. Haeber Roofing Co., supra.

Carrier asserts that claimant has made an election of remedies and is estopped to deny that Employment Services was her employer at the time of her injury since she named Employment Services as her employer in her claim for compensation and carrier paid claimant TIB's and cites Brown v. Hawes, 764 S.W.2d 855 (Tex. App.-Austin 1989, no writ) in support of its assertion. We disagree. In Brown, the court held that whether a purchaser of real property elected specific performance, or not, could not be raised by special exceptions. The court cited Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848 (Tex. 1980) for the proposition that the doctrine of election may bar recovery when (1) one successfully exercises an informed choice, (2) between two or more remedies, rights, or states of facts, (3) which are so inconsistent as to, (4) constitute manifest injustice. In Bocanegra, the Texas Supreme Court held that where an insured reached a settlement with the workers' compensation carrier for lost wages and future impaired earning capacity resulting from occupational injury, but the insured lacked knowledge of whether the injury was occupational or non-occupational at that time, the settlement was not an informed election that barred the insured's action on a group medical and hospital policy to recover the amount of her medical and hospital bills resulting from non-occupational disease. The court stated that one's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. The court then noted that the definition of an occupational disease was itself complex and difficult and that uncertainty in many complex areas of medicine and law is more the rule than the exception.

In the present case, the claimant's original claim named Employment Services as her employer, but claimant then filed an amended claim which named Temporary Employer as her employer and, at the hearing, took the position that Temporary Employer was her employer. In determining whether claimant's first choice was made with a full and clear understanding of the problems, facts, and remedies essential to the exercise of an intelligent choice, we look to the complexity and difficulty of the issue with which she was faced in making her choice, as did the Texas Supreme Court in Bocanegra. It has been stated by the Texas Supreme Court that whether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question. Producers Chemical Company v. McKay, supra. We hold that, given the difficulty and uncertainty surrounding the borrowed servant issue, claimant did not make such an election as would estop her from denying that Employment Services was her employer at the time of her injury. The fact that carrier paid TIB's to claimant is of no relevance on the issue of borrowed servant because the payment of benefits to an employee on behalf of an employer does not entitle the employer to enjoy status of "employer" under the workers' compensation law. Archem v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ); Carr v. Carroll Co., supra.

Carrier next asserts that the legislature abolished or abandoned the "borrowed servant" doctrine under the 1989 Act. We disagree. While carrier is correct in pointing out that the definition of "employer" in Article 8308-1.03(19) does not mention right of control, neither did the definition of "employer" under the prior workers' compensation law. Tex. Rev. Civ. Stat. Ann. art. 8309, ' 1 [repealed]. Yet, under the prior law, the borrowed servant doctrine was applied by Texas courts. See Carr v. Carroll Co., supra; Denison v. Haeber Roofing Co., supra, Archem v. Austin Industrial, Inc., supra. Carrier is also correct in noting that the definition of "employer" under the 1989 Act includes the element of having workers' compensation insurance coverage. However, we do not believe that the legislature intended, by including the element of workers' compensation coverage in the definition of "employer", to preclude the possibility that an entity could be found to be the employer of an employee but not have workers' compensation coverage. To construe the 1989 Act in that way would render meaningless Article 8308-3.03 relating to common law defenses in an action against an employer who does not have workers' compensation insurance coverage. Texas courts have long recognized that a general employee of one employer may become the borrowed servant of another. Carr v. Carroll Co., supra. We do not find within the 1989 Act an intention on the part of the legislature to abandon or abolish the borrowed servant doctrine.

In our view, the weight of legal authority supports claimant's contention that she was a borrowed employee of Temporary Employer at the time of her injury, and is against carrier's contentions that claimant was an employee of Employment Services at the time of her injury and that she is estopped from asserting the borrowed servant doctrine due to her original claim or through carrier's payments. Since the hearing officer made no finding on whether the carrier in this case was the carrier for Temporary Employer, we remand the case for further development and consideration of evidence on that issue. Although our remand disposes of this appeal, we address the other contentions of claimant and carrier for the purpose of giving direction to the hearing officer on remand.

The hearing officer concluded that the AWW of claimant must be determined according to Article 8308-4.10(g), because claimant had not worked 13 weeks prior to her injury and no probative evidence was introduced to establish an AWW based upon the AWW of a same or similar employee. He then concluded that a fair and just AWW pursuant to the requirements of Article 8308-4.10(g) was $154.00. Both claimant and carrier contend that these conclusions are erroneous. Claimant asserts that the evidence supports a finding that the AWW of a same or similar employee employed by Temporary Employer was $280.00, and carrier asserts that the evidence supports a finding that the AWW of a same or similar employee employed by Employment Services was $121.56. We disagree with both claimant's and carrier's assertions.

Claimant was injured on _____. Her employment with Employment Services began in December 1990, and she began her work assignment with Temporary Employer on December 18, 1990. Thus, since she did not work for either employer for at least 13 consecutive weeks immediately preceding her injury, Article 8308-4.10(a) and 28 TEX. ADMIN. CODE § 128.3(d) (Texas Workers' Compensation Commission Rule 128.3(d)) are not used in calculating her AWW for TIB's, regardless of whether she was an employee of Temporary Employer or Employment Services at the time of her injury.

We next consider Article 8308-4.10(b) relating to the AWW of an employee who has worked for the employer for fewer than 13 weeks immediately preceding the injury, as that

article was implemented by Rule 128(e) and (f). In attempting to establish the wages paid by Temporary Employer to a similar employee who performs similar services, but who earned wages for at least 13 weeks, claimant testified that a supervisor on the taco line was paid more than $9.00 per hour and a co-worker on the taco line was paid more than $7.00 per hour. She further testified that both the supervisor and co-worker worked for Temporary Employer for over one year and that the claimant and the $7.00 per hour co-worker did the same type of work. Claimant's testimony relating to the supervisor was not evidence tending to establish that the supervisor was a "similar employee" performing "similar services" as those terms are defined in Rule 128.3(f). While claimant's testimony regarding the $7.00 per hour co-worker was some evidence that the co-worker performed "similar services" it did not provide a basis in this case for a finding that the co-worker was a "similar employee", defined in Rule 128.3(f)(1) as a person with training, experience, and skills that are comparable to the injured employee. Therefore, claimant's evidence was not such as would compel the hearing officer to find that claimant's AWW (as an employee of Temporary Employer) was $280.00 as asserted by claimant under Article 8308-4.10(b) and Rule 128.3(e).

Employment Services' initial Employer's Wage Statement stated that there was no similar employee available. However, a second Employer's Wage Statement identified a "CS" as a similar employee, listed 13 weeks worked, days and hours worked each week, gross pay per week, and total gross pay of $1,580.22 for the 13 weeks. Claimant's supervisor at Employment Services testified that CS was an employee of Employment Services and did the same sort of light industrial work as claimant, but that the information on this employee was probably generated by the company's computer using a service code. She testified that the service code selects an employee at random who has the same skills. While the supervisor's testimony and the second wage statement may be some evidence that CS was a similar employee performing similar services, the hearing officer was not compelled to make a finding that claimant's AWW (as an employee of Employment Services) was $121.56 based on this evidence as asserted by the carrier because none of the weeks that are shown as having been worked by CS are within the 13 weeks immediately preceding claimant's injury. Twelve of the weeks are within the period of February through May 1990, and one week is the last week of March 1991. Rule 128.3(e) states in part that when a similar employee is identified, the wages paid to that person for the 13 weeks immediately preceding the injury are added together, and divided by 13.

Article 8308-4.10(g) permits the commission to determine the employee's AWW by any method that it considers fair, just, and reasonable to all parties if the methods under Article 8308-4.10(a) and (b) cannot be applied. The evidence showed that claimant made $4.20 per hour when she was assigned to work at Temporary Employer, but made $4.40 per hour at the time of her injury. The most hours she worked for Temporary Employer in any one week was 28.25 hours, but during the three weeks she worked she was unable to work three days because of the Christmas and New Year holidays and lost one day of work due to car trouble. Claimant normally worked eight hours on the days she worked. We find that the hearing officer could reasonably conclude from this evidence that a fair, just and reasonable AWW for claimant was $154.00.

The hearing officer determined that claimant was eligible for TIB's payable at $115.50 per week. Claimant contends that the amount should be greater based on an AWW of $280.00. Carrier contends that claimant's TIB's cannot exceed $64.00 per week

based on her actual earnings for the previous year. Alternatively, carrier contends that TIB's should be $91.17 per week based on an AWW of $121.56.

We have found that the hearing officer's determination of AWW of $154.00 was supported by the evidence. As it is undisputed that claimant earned less than $8.50 per hour, her TIB's must be calculated in accordance with Article 8308-4.23(d) as implemented by Rule 129.2 relating to calculation of TIB's for employees who earn less than $8.50 per hour. For the purpose of making the TIB's calculation under Rule 129.2, we note that claimant testified that the only W-2 statement she received in 1990 was from Employment Services, and that she began working for Employment Services in 1990. Her total gross pay from Employment Services for 1990 was $186.90, as reflected on the Employer's Wage Statement. There are no Texas Employment Commission wage reports in the record nor does the record contain a copy of claimant's federal income tax return for 1990 as she did not file one. Carrier's Exhibit C-9, Employment Services' personnel record for claimant, shows that claimant listed a trucking company as a previous employer from September 1989 to April 1990 and that her salary at that job was $275 per week. It does not reflect any other previous employers during 1990. Claimant had no earnings from employment from January 3, 1991 to April 18, 1991 as a result of her injuries. The record also shows that claimant's doctor released her for light duty work on April 15, 1991, that claimant began working again on April 18, 1991, and that her doctor released her to work normal duties on April 29, 1991.

Rule 129.2(a) provides that an employee who earns less than $8.50 per hour shall have TIB's for the first 26 weeks of entitlement computed by subsection (a) of that rule. In applying that rule we first find that 70% of the difference between claimant's AWW and claimant's weekly earnings after the injury to April 18, 1991 was $107.80 (($154-0) x 70% = $107.80). Next we find that 75% of the difference between claimant's AWW and claimant's weekly earnings after the injury to April 18, 1991 was $115.50 (($154-0) x 75% = $115.50). Next we must calculate claimant's actual average weekly earnings for the previous year under the method described in subsection (d) of Article 8308-4.23. This article provides that the weekly TIB's under subsection (d) may not exceed 100 % of the employee's actual earnings for the previous year, that a rebuttable presumption of the employee's actual earnings for the previous year shall be established by one of the three methods listed in the subsection, and that a presumption under that subsection may be rebutted by other credible evidence of the employee's actual earnings. The first two methods require the use of Texas Employment Commission (TEC) wage reports, which are not in evidence, and the third method permits the use of other credible evidence when the TEC does not have a wage report reflecting at least one quarter's earnings due to the fact that the employee worked outside this state during the previous year. There is no evidence that claimant worked outside this state during 1990.

Since the record does not contain the necessary evidence to support a presumption under Article 8308-4.23(d) of claimant's actual earnings for the previous year, we must apply the subsection (d) methods to what evidence there is in the record. The evidence supports a finding that claimant's actual earnings in 1990 were $3,486.90 ($275 x 12 weeks = $3,300 working for trucking company plus $186.90 working for Employment Services). The record does not support a finding that claimant's 1990 earnings are not representative of her usual earnings. Thus, we do not apply the second method of taking the quarter with the highest earnings and dividing by 13, but apply the first method by dividing claimant's actual earnings of $3,486.90 in the previous year by 52 which results in actual average

weekly earnings for the pervious year of $67.05.

Rule 129.2(a) next directs us to compare the results of the second and third calculations ($115.50 and $67.05) and select the lower number which is $67.05. The next step in the rule is to compare $67.05 with the result of our first calculation, $107.80, and select the higher number which is $107.80. Finally, Rule 129.2(a)(6) directs us to compare the $107.80 with the minimum weekly benefit in effect on the date of the injury, which was $64.00. The rule states that the higher number is the weekly TIB for the injured employee, not to exceed the maximum weekly benefit in effect on the date of the injury ($428.00). Therefore, in accordance with the provisions of Rule 129.2(a), claimant's TIB's to April 18, 1991, should have been $107.80 per week, and not $115.50 as found by the hearing officer, nor greater than $115.50 as asserted by claimant, nor $91.17 or $64.00 as asserted by carrier.

Carrier complains that the hearing officer erred in deciding and ordering that it pay TIB's from April 18, 1991 until the date of receipt of the Decision and Order at the rate of $115.50 per week. We address this issue in the event carrier is found, on remand, to have been the workers' compensation insurance carrier for Temporary Employer on the date of injury.

The record reflects that beginning April 18, 1991, claimant returned to work at Employment Services and worked several assignments for various time periods at hourly rates of $4.25 and $4.30. Contrary to carrier's assertion, the hearing officer did not simply order it to pay TIB's from April 18, 1991 until the date of receipt of the decision at the rate of $115.50 per week, but instead determined that claimant was entitled to receive TIB's from April 18, 1991 at $115.50 per week, unless that amount is reduced pursuant to Article 8308-4.23(d) and (f) and Rules 129.1 through 129.5, and directed carrier to compute the amounts owed from April 18, 1991 to the date carrier received the decision and pay those benefits in a lump sum. Thus, the hearing officer's order contemplates an adjustment to TIB's based on the factors set forth in the cited article and rules, which includes in Rule 129.2(a) and (b) and in Rule 129.4(a) consideration of the claimant's weekly earnings after the injury. We also note that Rule 129.2(b) provides, with respect to employees who earn less than $8.50 per hour, that after the 26th week of eligibility until the end of the TIB period, benefits for the injured employee shall be paid at the rate of 70% of the difference between the AWW and the employee's weekly earnings after the injury [as opposed to 75%, subject to limitations previously discussed, for the first 26 weeks]. Thus, except for changing the weekly TIB's rate from $115.50 to $107.80, as we have determined to be the correct rate under Rule 129.2(a), we find that portion of the hearing officer's decision which orders payment of TIB's unless reduced by the article and rules mentioned, to be correct.

The carrier next asserts that the hearing officer erred in deciding and ordering that carrier shall pay TIB's from the date of receipt of the Decision and Order until either claimant has reached MMI or December 31, 1993. We address this contention in the event carrier is found to have been the workers' compensation insurer for Temporary Employer on the date of the injury.

We note that, after ordering carrier to compute and to pay TIB's from April 18, 1991 to the date of receipt of the decision in a lump sum, the hearing officer directed carrier to compute the appropriate amount of TIB's due and payable each week to claimant and to pay those benefits until claimant has reached MMI or until December 31, 1993. The order

to compute TIB's necessarily entails consideration of factors such as claimant's weekly earnings after the injury as previously discussed.

Carrier's main argument is that the hearing officer erred in failing to find that a full release to normal duties is a finding of MMI, since the doctor is finding that a person has returned to a condition which is at least as physically capable as before the injury. It is undisputed that claimant's treating doctor issued a disability statement permitting claimant to return to restricted duties on April 15, 1991, and permitting claimant to return to normal duties on April 29, 1991. But, there is no evidence in the record that claimant's treating doctor certified that claimant had reached MMI and the hearing officer found that the doctor did not complete the required MMI certification form. Claimant testified that she is not well now, that she hurts real bad when she stoops and bends at her present job, and that due to how it pulls and feels when she picks up something, she is afraid to try and pick up anything. She also stated that she was next scheduled to see her doctor on August 5, 1991.

Article 8308-4.23(b) provides that TIB's continue until the employee has reached MMI. Subsection (g) of that article provides that the commission shall adopt rules establishing a presumption that MMI has been reached based on a lack of medical improvement in the employee's condition. Article 8308-1.03(32) defines MMI as the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue.

The commission has adopted rules implementing the MMI provisions of the 1989 Act. Rule 130.1 provides in part that a doctor who is required to certify whether an employee has reached MMI shall complete and file a medical evaluation report, that "certification" or "certify" means the formal assertion of medical facts or expert opinion by a doctor supporting or relating to whether an employee has or has not reached MMI, and that all reports under this rule shall be on a form prescribed by the commission and shall contain, among other things, a statement that the employee has reached, or an estimate of when the employee will reach, MMI. Rule 130.2(a) provides in part that a treating doctor shall examine the employee and certify that an employee has reached MMI. Rule 130.3 relates to certification of MMI by a doctor other than the treating doctor. Rule 130.4(a) states that if 104 weeks have passed since the date that TIB's began to accrue, MMI has, by definition been reached. Rule 130.4(b) sets forth the procedure the carrier may invoke if there has not been a certification from a doctor that an injured employee has reached MMI.

In applying the statutory and rule provisions to the facts of this case, we find that the disability statement issued by claimant's doctor which permits her to return to work on April 29, 1991, is not the Report of Medical Evaluation form (TWCC-69) required under Rule 130.1. More importantly, claimant's doctor did not "certify" by formal assertion of medical facts or expert opinion that claimant had or had not reached MMI as required under Rule 130.2(a) and Rule 130.1(b). We also note that the record fails to show that carrier invoked the procedures set forth in Rule 130.4(b) relating to resolution when MMI has not been certified.

Given the statutory definition of MMI and the requirement that MMI be certified, it is our opinion that the doctor's statement that "patient may return to normal duties", was not sufficient to support a finding that the injured employee had reached MMI. We think that, if

the commission, in promulgating the detailed rules implementing the MMI provisions, had intended to equate a "return to work" statement with an MMI certification it would have expressly done so. Thus, we disagree with carrier's argument that the hearing officer erred in failing to find that the release to normal duties was a finding of MMI.

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

In summary, we hold that:

(1) claimant was an employee of Temporary Employer at the time of her injury, and was not an employee of Employment Services at the time of her injury as found by the hearing officer;

(2) the evidence supports the hearing officer's conclusion that claimant's AWW was $154.00 (as either an employee of Temporary Employer or Employment Services);

(3) claimant's weekly TIB's rate from the date of her disability to April 18, 1990 was $107.80 (as either an employee of Temporary Employer or Employment Services), and not $115.50 as found by the hearing officer;

(4) if on remand it is determined that carrier is the workers' compensation insurer for Temporary Employer, then claimant is entitled to TIB's as adjusted in accordance with the applicable provisions of the 1989 Act and the applicable commission rules, until she reaches MMI (if MMI is not earlier certified, then MMI will have been reached on January 2, 1993), and carrier will be liable for payment of TIB's, and

(5) if on remand, it is determined that carrier is not the workers' compensation insurer for Temporary Employer, then claimant's claim against carrier for workers' compensation benefits should be denied.

We reverse the decision of the hearing officer and remand the case to the hearing officer for further consideration and development of evidence consistent with this decision.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge