APPEAL NO. 172600
FILED DECEMBER 29, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 27, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the respondent (claimant) is entitled to $7,037.55 in partial temporary income benefits (TIBs) from October 29, 2016, through June 16, 2017; (2) the claimant is entitled to full TIBs from June 17, 2017, through the date of the CCH; and (3) the employer did not make a bona fide offer of employment (BFOE) on May 18, 2017, to the claimant entitling the appellant (carrier) to adjust the post-injury weekly earnings from June 17, 2017, through the date of the CCH.

The carrier appealed the ALJ's determinations. The carrier argues on appeal that the ALJ's determinations are manifestly unjust and against the great weight of the evidence. The claimant responded, urging affirmance of the ALJ's determinations.

DECISION

Reversed and remanded.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the claimant is entitled to partial TIBs from October 29, 2016, through June 16, 2017; the claimant's average weekly wage (AWW) is $495.18; and the claimant had disability from October 29, 2016, through the date of the CCH. The claimant testified she was injured when she slipped and fell at work.

TIBs FROM OCTOBER 29, 2016, THROUGH JUNE 16, 2017

It is undisputed that the employer made offers of employment to the claimant after the date of injury for light duty and that the claimant accepted those offers. It is also undisputed that the claimant worked for the employer in a light duty status after the date of injury and was terminated on June 16, 2017. It is further undisputed that the claimant requested the employer to reduce her hours so that her income would not impact her receipt of Social Security disability benefits for a condition unrelated to the compensable injury.

Section 408.103(a) provides, in part, that subject to Sections 408.061 and 408.062 (the maximum and minimum TIBs rates), the amount of a temporary income benefit is equal to 70% of the amount computed by subtracting the employee's weekly

earnings after the injury from the employee's AWW, or for the first 26 weeks 75% of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's AWW if the employee earns less than $10 an hour. 28 TEX. ADMIN. CODE § 129.3(d) (Rule 129.3(d)) provides that the carrier shall calculate the employee's lost wages by subtracting post-injury earnings from the AWW. Rule 129.4(a) provides that the insurance carrier shall adjust the weekly amount of TIBs paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury.

In evidence is a calculation sheet offered by the claimant to establish the partial amount of TIBs for the disputed period. This calculation sheet estimates that the claimant is entitled to partial TIBs in the amount of $7,037.55. The claimant based this estimate on the following formula: AWW subtracted by the claimant's post-injury earnings multiplied by 75% for the first 26 weeks, and AWW subtracted by the claimant's post-injury earnings multiplied by 70% for the remaining weeks. The claimant based the value for post-injury earnings for each week on the number of hours she worked. The ALJ determined that the claimant is entitled to partial TIBs in the amount of $7,037.55 from October 29, 2016, through June 16, 2017.

The carrier argues that the value for post-injury earnings for each week as calculated by the claimant is incorrect because it does not consider that the claimant's hours were reduced, in part, based on her own request to lower her hours so that her income would not impact her receipt of Social Security disability benefits for a condition unrelated to the compensable injury. The carrier contends that the correct amount for post-injury earnings for each week should be the amount of offered wages, which was $360 per week, rather than the wages earned for the number of hours she worked each week.

The claimant testified at the CCH that she did in fact request the employer to reduce the number of hours she worked each week so that her Social Security disability benefits would not be affected. As previously noted, the claimant's Social Security disability benefits were for a condition unrelated to the compensable injury. The claimant also testified she missed time during the period at issue because of issues with her car, among other things. There was evidence presented that the claimant's time missed was for causes not related to the compensable injury. *See* Appeals Panel Decision (APD) 091807, decided January 29, 2010. The ALJ made no findings of fact on the evidence presented regarding the claimant's earnings based on reduced hours for reasons unrelated to the compensable injury, which impacts the amount of partial TIBs to which the claimant is entitled. Accordingly, we reverse the ALJ's determination that the claimant is entitled to $7,037.55 in partial TIBs from October 29, 2016, through

June 16, 2017, and we remand this issue to the ALJ for further action consistent with this decision.

BFOE AND TIBs FROM JUNE 17, 2017, THROUGH THE DATE OF THE CCH

The ALJ determined that the employer did not make a BFOE on May 18, 2017, to the claimant entitling the carrier to adjust the post-injury weekly earnings from June 17, 2017, through the date of the CCH, and that the claimant is entitled to full TIBs from June 17, 2017, through the date of the CCH. The ALJ noted that in evidence is a letter dated May 18, 2017, in which the employer offered the claimant a light duty position. Regarding that offer the ALJ stated the following:

> Although the offer outlined the job activities and time requirements that the position would entail, the offer did not persuasively describe how she could perform those activities within her work restrictions.

Section 408.103(e) provides, in part, that if an employee is offered a BFOE that the employee is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly earnings after the injury are equal to the weekly wage for the position offered to the employee. Section 408.144(c) provides, in part, that if an employee is offered a BFOE that the employee is capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee, the employee's weekly wages are considered to be equal to the weekly wages for the position offered to the employee.

Rule 129.6 provides:

> (a) An employer or insurance carrier may request the treating doctor provide a Work Status Report [DWC-73] 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 to work. The functional job descriptions must include descriptions of the physical and time requirements of the positions.
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> (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 [DWC-73] 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 [Texas Department of Insurance, Division of Workers' Compensation (Division)]. A copy of the [DWC-73] 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 [BFOE] if:

(1) it has written copies of the [DWC-73] 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 [Division] and included all the information required by subsection (c) of this section.

(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 [Division] 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 [BFOE] to be [post-injury earnings], as outlined in [Rule] 129.2 of this title (relating to Entitlement to [TIBs]), 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 [post-injury earnings] are those that would have been paid on or after the date the carrier is permitted to deem the offered wages as [post-injury earnings].

(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 [Division] 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.

Neither the Act nor Rule 129.6 require that the offer describe how an injured employee can perform the job activities within his or her work restrictions. The ALJ has used an incorrect standard of law in making her determination. Accordingly, we reverse the ALJ's determination that the employer did not make a BFOE on May 18, 2017, to the claimant entitling the carrier to adjust the post-injury weekly earnings from June 17,

2017, through the date of the CCH, and we remand this issue to the ALJ for further action consistent with this decision.

Because we have reversed the ALJ's determination that the employer did not make a BFOE on May 18, 2017, to the claimant, we also reverse the ALJ's determination that the claimant is entitled to full TIBs from June 17, 2017, through the date of the CCH, and we remand this issue to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant is entitled to $7,037.55 in partial TIBs from October 29, 2016, through June 16, 2017, and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the employer did not make a BFOE on May 18, 2017, to the claimant entitling the carrier to adjust the post-injury weekly earnings from June 17, 2017, through the date of the CCH, and we remand this issue to the ALJ for further action consistent with this decision.

We reverse the ALJ's determination that the claimant is entitled to full TIBs from June 17, 2017, through the date of the CCH, and we remand this issue to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

On remand the ALJ is to consider the evidence regarding the claimant's earnings based on reduced hours for reasons unrelated to the compensable injury and determine how this evidence impacts the amount of partial TIBs to which the claimant is entitled. The ALJ is then to determine the amount of partial TIBs to which the claimant is entitled from October 29, 2016, through June 16, 2017, based on the evidence. The ALJ is also to determine whether the employer tendered a BFOE to the claimant on May 18, 2017, using the correct standard of law. The ALJ is then to determine whether the claimant is entitled to full TIBs from June 17, 2017, through the date of the CCH.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the

Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge