APPEAL NO. 92363

A contested case hearing was held on June 23, 1992 at (city), Texas, (hearing officer) presiding as hearing officer. He determined that the respondent had disability between January 17, 1992 through February 18, 1992 and was entitled to temporary income benefits (TIBs) for that period under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges that the evidence overwhelmingly demonstrates the absence of disability and the existence of maximum medical improvement (MMI), and asks that we reverse and render a new decision. No response was filed.

DECISION

Determining the decision of the hearing officer was not against the great weight and preponderance of the evidence, we affirm.

Succinctly, on (date of injury), the respondent injured his elbow on the job, a matter that was not disputed. However, although he missed some days he was able to continue working under some restrictions. He elected to be paid sick leave rather than any income benefits under workers' compensation. Since he did not feel he was getting better, he asked to see a specialist and was referred to one in January 1992. Starting January 15, 1992, according to his testimony, the appellant was prescribed physical therapy five times a week. When his sick leave ran out on January 16th, the appellant attempted to have his therapy sessions classified as "without pay" but was informed by his supervisor that he had to use up any available vacation time before he could be considered for leave without pay. Consequently, during the period January 17th through February 18th his vacation time was reduced for the time he was in therapy. He testified that during that period he was not making the same wage that he was making previously, although he was not specific on the amount involved. At the hearing, the only issue in dispute was whether the respondent had disability from January 17, 1992 through February 18, 1992. The respondent testified that he was taken off work completely from February 19 to March 23, 1992, and that he was paid TIBs for this period.

Appellant introduced several documents into evidence which indicate, *inter alia*, an anticipated return to full work as of "1-10-92" (Texas Workers' Compensation Commission Form 64 (2/91)), a release to full time work (Texas Workers' Compensation Commission Form 69 (2/91)) which is unsigned, and does not contain a date as to when the respondent apparently reached MMI but was apparently dictated on "3-20-92"), and an initial medical report showing anticipated return to limited work on "(date)," achieve MMI on 10-30-91 and a return to full work on "10-30-91."

Contrary to the assertions of appellant, these documents as submitted do not establish that MMI was reached during the period in question. As we have previously held, an unsigned statement as to maximum medical improvement does not comply with necessary requirements to certify MMI. Texas Workers' Compensation Commission

Appeal No. 92027 (Docket No. redacted) decided March 27, 1992. We have also held that a return to work does not necessarily indicate that maximum medical improvement has been attained. Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991.

There is evidence to support the hearing officer's finding of fact that the respondent had not reached MMI. Too, the fact of a compensable injury having been sustained by the respondent was not in dispute. The respondent elected to utilize sick leave in lieu of compensation under Article 8309g Sec. 12(a) which provides:

> An employee may elect to utilize accrued sick leave before receiving weekly payments of compensation. If the employee elects to utilize sick leave, the employee is not entitled to weekly payments of compensation under this article until he has exhausted his accrued sick leave.

We find it significant that this article, which is applicable to the employer in this case by operation of Article 8309g-1, is specifically different from Article 8309b, which covers (University) employees. Sec. 9 of that Article provides:

. . . except that the institution may provide than an injured workman may remain on the payroll until his earned annual and sick leave is exhausted, during which time . . . no workmen's compensation payment will accrue or become due and payable to the injured workman. (emphasis ours)

As indicated in the evidence, respondent's sick leave entitlement was exhausted on January 17, 1992. At that time respondent was still on limited duty and was on a five times a week physical therapy schedule. With the time off of work necessary to obtain the physical therapy resulting from his compensable injury, his wage was no longer equivalent to his preinjury wage because of his compensable injury (Article 8308-1.03(16)) unless he was charged with accrued vacation time. However, his supervisor advised him that he would have to exhaust his vacation time before he could be classified as "without pay" and, therefore, be entitled to any temporary income benefits. We do not find such a requirement imposed or authorized under Article 8309g Sec. 12(a) as contrasted to the specific provisions included by the legislature in Article 8309b that apply to (university) employees.

Article 8308-4.22 provides for weekly income benefits once disability extends beyond one week and sets out that if disability does not follow at once after the injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits begin to accrue on the eighth day after the date the disability began. Further, if the disability continues for more than four weeks, compensation is computed from the beginning date of the disability. Here, there is probative evidence to support the hearing officer's determination that disability initiated when the sick leave was exhausted, January 17, 1991, although the exact amount of any temporary income benefit was not determined. This can be calculated in accordance with his decision. We observe that Article 8309g Sec.12 provides that an employee may elect to utilize accrued sick leave before receiving compensation under the 1989 Act. However, there is no election or mandate provided regarding the utilization of accrued vacation time before receiving weekly compensation benefits. If indeed, there is such a employer policy concerning income benefits for work related injuries, it is not in accord with the 1989 Act and would not control under these circumstances. We take note of Article V, Sec. 8 paragraph 11 of the General Appropriations Act for 1991-1993, which provides in pertinent part that "except for disciplinary and workers compensation situations, all accumulated paid leave must be exhausted before granting" leave without pay or leave of absence without pay. Further, an opinion of the Attorney General of Texas (Op. Tex. Att'y Gen. No. H-701 (1975)), which addressed the relationship under the prior law, between sick leave and workers' compensation, indicated that once a state employee exhausts accrued sick leave he becomes eligible for workers' compensation benefits (under prior law there was no election as whether to first exhaust sick leave). The opinion also advises that there is "no statutory requirement that workmen's compensation benefits be offset against payments for compensatory time and vacation, and that no such offset is permitted."

The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge