APPEAL NO. 92649

A contested case hearing was held on November 5, 1992. He (hearing officer) determined that the appellant (claimant) had disability from (date of injury) through June 4, 1992, the date upon which her contract of employment ended, and was entitled to temporary income benefits (TIBS) during that period of time. Claimant appeals this determination urging that her disability and entitlement to TIBS did not end until June 16th, when she reached maximum medical improvement (MMI). Respondent (carrier) asks that the decision be affirmed.

DECISION

We reverse the hearing officer's determination that the claimant did not have disability, as that term is defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1992) (1989 Act), for the period from June 5, 1992 through the date that she was determined to have reached maximum medical improvement (MMI), which was June 16, 1992, and render a decision that she had disability from (date of injury) until June 16, 1992.

The factual basis in this case was not in dispute and the occurrence of a compensable injury was not contested. Succinctly, the claimant, an employee of the carrier, an independent school district, was employed for the school year which began the previous August and ended on June 4, 1992. (She is currently employed for the 1992-1993 school year). She had been an employee of the school district under this type of employment arrangement since 1986, was paid only during the contract periods, and had never worked during the summer periods. Carrier had only a few summer positions for individuals like the claimant and such persons could apply or bid for them. The claimant stated she had applied for one of the positions in the spring of 1992 but that she was not accepted. A witness for the carrier made a statement that the claimant had not applied for a summer position and testified that he had talked to the "payroll clerk" but they did not have anything on an application by the claimant. He also indicated that an application could have been rejected. The claimant indicated that as far as she was concerned she was not going to be working during the summer of 1992, but also stated that she was not physically able to work when the school year ended on June 4, 1992 because of an injury which occurred on _____.

On _____, the claimant injured her index finger, the fact of which is not in dispute. She went to Dr. H on that date and a splint was put on her finger. Dr. H indicated on a Texas Workers' Compensation Commission Form 61, Initial Medical Report (TWCC-61), that he anticipated that the claimant could return to limited work on May 22, 1992, return to full-time duty on May 26, 1992 and would achieve MMI on June 4, 1992. The claimant's supervisor told her that there was no light duty available but that the claimant could come

back to work when she had a full release. Claimant did not go back to work on the 26th of May because she did not have a full release from Dr. H who was out of town. The claimant subsequently saw a Dr. R on June 9, 1992, who removed the splint and treated the claimant. Dr. R's TWCC-61 shows an anticipated return-to-full-work date of June 17, 1992. Dr. R thereafter determined that claimant attained MMI effective "6/16/92" and zero percent impairment.

As indicated, the hearing officer determined the claimant had disability from _____ through June 4, 1992. He also found that the claimant, during the course of her employment, had not worked during the summers between the end of one school year and the beginning of the next pursuant to her employment arrangements with the school district and that she was not paid wages for the summer periods. He also found that the claimant did not work elsewhere during each summer, and that "she had not sought employment elsewhere during the summer after her injury." He also found that "[t]he Claimant's inability to obtain and retain employment after June 4, 1992, the last day of school for that school year, was related to her standard work practices and not to the injury" and that, accordingly, there was no disability after June 4, 1992.

An employee who has not attained MMI from a work-related injury is entitled to temporary income benefits if he or she also has "disability." Article 8308-4.23(a). Disability is defined in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). The injured employee must not only show a difference between pre-injury and post-injury wages, but also that his or her inability to obtain and retain employment is because of that injury. Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. A limited medical release to work is strong evidence that the injury continues to impact the ability to work, and that disability continues. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The definition of disability in the 1989 Act does not contain a provision for analyzing, as the hearing officer has done here, whether an employee whose injury resulted in disability elected to reenter the job market after her contract with the employer had expired. The definition does, however, invite analysis along the lines of whether, if the employee wanted to return to work, she would have been physically capable of doing so.

The hearing officer found, as fact, that through June 4, 1992, the claimant's injury caused an inability to obtain and retain employment. There is no evidence in this record that her physical condition or status of her injury changed at midnight, June 4th, or her demonstrated inability to obtain and retain employment because of her injury had ceased. To the contrary, the undisputed evidence is that she continued under a limited release to work up to the date of MMI. For purposes of determining whether claimant's established disability continued, the majority herein do not agree that the mere ending of claimant's term contract of employment, coupled with her intent (formulated before the injury occurred) not to work during the summer, overrode the effect of the injury on her ability to obtain

employment. Even if we were to assume that claimant's election to work is relevant to the issue of whether her disability continued, it seems self-evident that the claimant's injury effectively eliminated any "choice" she may have exercised to return to the work force after her contract expired. In situations where an injured employee affirmatively chooses to forego gainful employment that he or she is capable of doing, the Act provides for a reduction of TIBs under Article 8308-4.23(f).

We would note that the 1989 Act also provides a way to adjust payment of TIBs to more accurately reflect loss of earnings related to cyclical employment patterns through adjustment of amount of the benefit paid, and not through the shifting of an injured worker in and out of periods of entitlement. The carrier argues here that the claimant is a seasonal worker. In that case, Article 8308-4.10(d) plainly indicates that its remedy is to ask that the average weekly wage of claimant be "adjusted as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid." Texas W.C. Comm'n, 28 TEX. ADMIN. CODE ' 128.5(c) (Rule 128.5) allows a carrier to present evidence of the past seasonal earnings in seeking such adjustment. The Legislature could have provided, but did not, that the threshold entitlement of seasonal and cyclical workers to TIBs be likewise suspended for periods of time that they were historically not employed before the injury. The majority here is not willing to read such a provision into Article 8308-1.03(16). *Compare* Shaw v. Industrial Commission, 510 P. 2d 47 (Ariz. 1973) (court rejected contention that an employee's period of disability payments should be limited to six months because she customarily worked only six months a year).

We appreciate the concern of the dissent with the prospect of a "windfall" in such cases. However, we would point out that the logical extension of the hearing officer's decision grants a similar "windfall" to carriers if the injured worker has the misfortune to be injured and rendered unemployable at the end, rather than the beginning, of the contract term. We are unwilling to adopt an interpretation of the Act which would truncate the claimant's benefit period because she incurred her disability in the ninth month, rather than the first month, of the school year.

We conclude that the hearing officer's finding that the claimant's inability to work after June 4, 1992 was related to her standard work practices and not to the injury to be against the great weight and preponderance of the evidence so as to be manifestly unjust. We find that his conclusion of law that claimant had disability from _____ through June 4, 1992 is erroneous because the claimant's "disability" as defined in the 1989 Act continued notwithstanding the end of her employment contract and her standard past work practices. We reverse and render the decision that the claimant had disability from _____ until June 16, 1992.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I respectfully dissent for the following reasons.

Disability is defined in economic terms in the 1989 Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Where a compensable injury results in an employee not being able to obtain and retain employment at equivalent wages, then the employee is entitled to TIBS until MMI is reached. Article 8308-4.23(a). The question presented under the particular facts of this case concerns whether the claimant's injury resulted in her loss of ability to obtain and retain employment following June 4, 1992, the end of her regular employment contract, or whether the overriding reason was her voluntary and usual practice of taking herself out of the employment market during the summer period. If the latter is the reason the claimant is not employed at an equivalent wage following June 4th, there would not appear to be, in my opinion, a sound basis for finding disability and the payment of TIBS, a partial substitution for lost wages resulting from an on-the-job injury. It has been stated that the purpose behind workers' compensation legislation is to compensate an injured worker for the loss of earning capacity, "and nothing more." St. Paul Insurance Co. v. McPeak, 641 S.W.2d 284, 286 (Tex. App.-Houston [14th Dist.] 1982, writ ref'd n.r.e.). *See also* Lumbermens Mutual Casualty Co. v. Villalpando, 605 S.W.2d 705 (Tex. Civ. App.-Corpus Christi 1980, no writ). We have observed that a very basic purpose of workers' compensation is to compensate injured workers for loss of wage earnings attributed to a work related injury. Texas Workers' Compensation Appeal No. 91027, decided October 24, 1991. Where, as here, the loss of earning capacity results primarily from the voluntary and usual practice of the claimant removing herself from the employment market during the period following the end of the school year, payment of TIBS after June 4th would be more of a windfall than compensation for lost earning capacity. Lifetime medical benefits for a compensable injury are specifically accorded an injured employee under the 1989 Act: payment of TIBS (a substitution for wages) is predicated on wages no longer being earned because of an inability to work as a result of a compensable injury. I do not find a basis for an entitlement to a wage substitution (TIBS) where no

wages would be earned because of the voluntary actions of a claimant in electing not to be employed. TIBS are payable to partially cover the lack of wages resulting from a compensable injury, not to compensate for the injury itself. *See generally* McPeak, *supra*. That is not to say, however, that disability and the entitlement to TIBS could not recur once an employee desiring employment is unable to obtain and retain employment because of a compensable injury. We have previously indicated that disability may stop and later begin again. Appeal No. 91027, *supra.*

I do not imply by this dissent that because the claimant's contract of employment ended on June 4, 1992, that the carrier's liability automatically ended on that day for an injury which occurred in the course and scope of employment. If the claimant remained in the employment market following June 4, 1992, even though no position was available with the school district, and she was unable to obtain or retain employment at wages equivalent to her preinjury wage because of the compensable injury, she would be eligible for TIBS. Classifying the claimant as a "seasonal employee," defined as an employee who, as a regular course of that employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year (Article 8308-4.10(d)), would not diminish her otherwise entitlement to TIBS. In computing the average weekly wage for the purpose of determining TIBS under Article 8308-4.10(d) for seasonal employees, it is provided that adjustments be made "as often as necessary to reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid." Under the particular facts of this case, there was no expectation of any wage earnings because of the claimant's voluntary and usual practice of not working during the summer period. I do not believe the provisions of the 1989 Act require the payment of TIBS where an employee is voluntarily not in the employment market any more than it is intended to provide a "shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities . . ." Texas Workers' Compensation Appeal No. 91045, decided November 21, 1991.

I would hold that the evidence is sufficient to support the findings of the hearing officer and that he correctly applied the 1989 Act to the particular facts of this case. I would affirm the decision.

Stark O. Sanders, Jr.
Chief Appeals Judge