

APPEAL NO. 92674

On October 30, 1992, a contested case hearing was held in with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether temporary income benefits (TIBS) were due the appellant, the claimant hereafter, under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The hearing officer determined that the claimant had disability from _____, the date of his work-related injury, until September 19, 1991, at which time disability ceased because the claimant voluntarily removed himself from the labor market (the claimant was incarcerated in prison on September 19, 1991 as a result of a 60 year sentence he received for a felony conviction for a robbery he committed prior to his injury), and has failed to prove by a preponderance of the evidence that his inability to obtain and retain employment at wages equivalent to his preinjury wage was because of a compensable injury. The hearing officer determined that the claimant was entitled to TIBS for the period of disability determined by the hearing officer.

The claimant contends that there was no evidence or insufficient evidence to support the hearing officer's determination, and that the 1989 Act does not make an exception or qualification to continuing disability when "there is the additional element of incarceration." The claimant requests that we reverse the determination of the hearing officer that the claimant is not entitled to continuing TIBS and that TIBS be reinstated to the claimant. Respondent, the carrier hereafter, responds that the hearing officer's decision is supported by the evidence and the law and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant and the carrier were represented by attorneys. The claimant was incarcerated in a prison in this State at the time of the hearing and participated in the hearing via teleconference call.

The claimant testified that he was injured on _____ while working as a laborer for (employer) when a jackhammer he was using to break concrete jumped up on his boot causing him to fall backward. He said that he received medical treatment at a hospital emergency room on the day of injury and that the emergency room doctor took him off work. No medical reports or records from the hospital emergency room were in evidence. The claimant said that as a result of his injury he had to wear a cast on his foot, but he did not say how long he had to wear the cast. The claimant testified that he did not work after his injury and that no doctor has released him to return to work. The claimant said that he was arrested in September 1991 and incarcerated on September 19, 1991. He said that his incarceration was the result of a 60 year sentence he received for a robbery which occurred prior to his injury of _____. He said he thinks he will see the parole board in 1993.

The claimant said that for the first six months of his incarceration he did a lot of strenuous work running a weaving machine in the prison textile mill and that that job gave him "lots of problems." He said that about a month before the hearing he was assigned to a "medical squad" for four hours of work per day by one of the prison doctors. He said the doctor told him he had no strength in his right leg. The claimant testified that he uses a walking cane prescribed by a prison doctor and wears a knee brace prescribed by a physical therapist. He said he has to use the cane and brace when he works and that he has no problems doing his current job which consists of wiping and dusting bars and walking around picking up trash, but that without the cane and brace he has more pain in his knee. The claimant said that he does not get paid for the work he does at the prison and that the work he does is something he has to do because if he does not do it he will be classified as a "security threat."

The claimant testified that prior to being incarcerated he was treated by Dr. O, and that Dr. O is still his treating doctor, although the last time he saw him was in August 1991. The only medical document introduced into evidence from Dr. O was a letter dated October 9, 1991 in which Dr. O stated that he began treating the claimant in June 1991, that the claimant complained of mild to severe pain about the medial and lateral retinaculum, that the claimant received noninvasive treatment to no avail, and that on July 24, 1991 he recommended an arthroscopic examination. Dr. O further stated in the letter that the claimant had not reached maximum medical improvement (MMI). The claimant testified that he believed that surgery for his right knee was scheduled in August 1991, but that he missed the scheduled surgery because he did not have transportation to the hospital. In response to the carrier's question that the reason he missed two scheduled surgeries was not because of his incarceration, the claimant responded in the negative. The claimant said that he has not as yet had arthroscopic surgery performed on his knee, that he does not know if or when such surgery might take place due to prison procedures relating to medical treatment and surgery only when absolutely necessary, and that if he were able to have surgery he would want it done.

The claimant testified that he began seeing the prison doctors when he was first incarcerated and that he sees a prison doctor every two or three weeks. He was taken to (Hospital) in (City 1), Texas, on September 3, 1992 to see a doctor. He said the doctor gave him pain medication but that the possibility of surgery on his knee was not discussed with him at that time. He does not know if or when he might be allowed to return to the hospital. He further testified that one of the prison doctors told him that it was possible that he had a torn meniscus and a cracked patella in his knee and that if that was the case it would need repair. He said the doctor could not be certain as to the condition of his knee because the doctor had not gone inside the knee. The claimant said that his knee gives him more problems now and is worse than when he was first incarcerated. He said he never knows when his knee will "buckle" on him and that after he stands for about an hour his knee starts hurting around the kneecap and behind the knee. He also said that his knee swells. He said he is currently taking medication prescribed by the prison doctors

which he said was for his knee pain. He also said that Dr. O is the only doctor that has recommended knee surgery and that he does not know what Dr. O's opinion regarding knee surgery is at the current time. The claimant said that he believed that the only way he could have knee surgery performed while incarcerated was to be recommended by the prison doctors to be taken to another doctor or to have a bench warrant issued to allow him to go to Dr. O.

Records from the prison clinic were in evidence. Several of the notations on these records are illegible. However, notations made in records of March 1992 showed that the claimant's work assignments would exclude standing for extended periods of time (time limit without rest four hours) and lifting greater than 50 pounds, that x-rays were to be done of the right knee, that an appointment was made for the claimant to see an "ortho," that the claimant complained of knee pain on several occasions, that the claimant had difficulty squatting because of his right knee, that the claimant needed to see a doctor because of pain in his right knee and foot, that medication was prescribed for his pain, and it was noted that the claimant needed a "walking stick & low bunk." An April 1992 record mentioned post-traumatic arthritis of the right knee, and a notation made in May 1992 showed that the claimant complained that his knee was bothering him at that time.

The hearing officer found that the claimant injured his right knee and ankle while working for his employer on _____; that the claimant was taken off work by a physician on _____, and has not been released to return to work; that the claimant was incarcerated in a state prison on September 19, 1991 as a result of a felony conviction; that the claimant received a sentence of 60 years for a robbery he committed prior to his injury; that the claimant uses a cane and a brace to ambulate and is assigned to a medical work squad in prison and his duties consist of wiping bars, dusting bars, and picking up trash; and that prior to his conviction the claimant was scheduled for arthroscopic surgery twice and missed the appointments due to lack of transportation. The hearing officer concluded that the claimant was injured in the course and scope of his employment on _____, and that the claimant had disability from _____, until September 19, 1991, at which time disability ceased because the claimant voluntarily removed himself from the labor market and has failed to prove by a preponderance of the evidence that his inability to obtain and retain employment at wages equivalent to his preinjury wage was because of a compensable injury. The hearing officer awarded the claimant TIBS from _____ until September 19, 1991.

Article 8308-4.23(a) provides that an employee who has disability and who has not attained MMI is entitled to TIBS. Section (b) of that article provides that TIBS continue until the employee has reached MMI. No contention was made by the carrier that the claimant has reached MMI. The thrust of the carrier's argument was that the claimant did not have disability after he was incarcerated. Article 8308-1.03(16) defines "disability" as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. We have held that eligibility for TIBS, once established, continues so

long as there is disability and MMI has not been reached, and that once the employee no longer has disability his entitlement to TIBS stop. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

In Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Vol. 1, Sec. 4.22, p. 4-86, the authors, in discussing disability under the 1989 Act, state that:

Income benefits accrue only if there is disability for at least one week. "Disability" is different from "incapacity for work," which triggered temporary disability benefits under the prior law. As defined in Section 1.03(16) of the new Act, "disability" means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Incapacity, under the prior law, measured the ability to obtain and retain employment performing the usual tasks of a workman. Hence, the capacity to perform usual tasks of a workman, important under the prior law, is no longer relevant. Instead, the new disability concept measures post-injury wages against pre-injury wages instead of physical limitations to perform an occupational task.

In Sec. 4.23 of the Guide the authors state that "TIBS are designed to assist the employee with respect to a `shortfall', so to speak, in the employee's wages due to a compensable injury (i.e., to replace those lost wages) during rehabilitation or until the employee reaches maximum medical improvement."

We have not directly addressed the issue of whether an employee's disability under the 1989 Act ceases upon incarceration in prison and we have found no Texas cases on point. However, in Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992 we had occasion to make the following comments in a case where the employee sustained a compensable injury on (date of injury for Appeal No. 92428), a doctor took him off work until November 28, 1991, there was insufficient evidence to support the hearing officer's finding of disability after November 28th, and the claimant was incarcerated on December 20, 1991:

With the evidence in this state, we do not reach the matter of whether a claimant's entitlement to temporary income benefits based upon disability as defined by the 1989 Act would end upon incarceration. By definition, disability requires that the inability to obtain or retain employment at wages equivalent to the preinjury wage be because of a compensable injury. Needless to say, incarceration results in the inability to obtain or retain employment other than whatever programs or opportunities are provided by the particular institution. There is no evidence on this latter matter in this case. We are not aware of any Texas case authority in this area as regards disability under the concepts of the 1989 Act. We do observe there is a split of opinion in other

state jurisdictions. See generally Larson's Workmen's Compensation Law, Vol. 1C, Sec. 47.31(g), pp. 8-333 Matthew Bender, N.Y., N.Y.

We do not find the cases cited by Professor Larson in Sec. 47.31(g) (Effect of Incarceration on Benefits Previously Awarded) of his treatise to be particularly helpful to a resolution of the issue before us because as far as we can discern from a reading of those cases, the statutes being applied were concerned with loss of wage earning capacity as found in the prior Texas Workers' Compensation Law, and not a measurement of post-injury wages against pre-injury wages as found under the 1989 Act. For example, in Sims v. R.D. Brooks, Incorporated, 204 N.W.2d 139 (Mich. Sup. Court 1973), the court stated that:

Defendants initially argue that plaintiff's incarceration subsequent to his injury terminates the obligation to pay compensation. This is not correct for plaintiff was found to be totally disabled. Under the Workmen's Compensation Act it is loss of wage earning capacity--not actual loss of wages--which is compensable. The award of compensation, based as it was on a finding of total disability, is not affected by plaintiff's later imprisonment.

Similarly, in Crawford v. Midwest Steel Company, Inc., 517 So. 2d 918 (La. App. 3 Cir. 1987), the court, in holding that the claimant's post-accident incarceration in a state penal institution did not disqualify him from the receipt of workers' compensation benefits for his total incapacity, stated that: "A reading of the Act, as effective on February 23, 1983, establishes that recovery is founded upon a diminution or loss of earning capacity. Compensation benefits are not paid in lieu of lost wages."

Several other cases have allowed compensation despite incarceration. See DeMars v. Roadway Express, 298 N.W.2d 645 (Mich. App. 1980); Beardon v. Industrial Commission of Arizona, 483 P.2d 568 (Ariz. App. 1971); Spera v. State of Wyoming, 713 P.2d 1155 (Wyo. 1986); and Ashcraft v. Industrial Commission of Ohio, 472 N.E.2d 1077 (Ohio 1984). Several cases have denied or suspended benefits during incarceration. See Mize v. Cleveland Express, 392 S.E.2d 275 (Ga. App. 1990); Baskerville v. Saunders Oil Co., Inc., 336 S.E.2d 512 (Va. App. 1985); Bilello v. A.J. Eckert Co., 350 N.Y.S. 2d 815 (N.Y. Sup. Ct. App. Div. 1974); and Brown v. Workmen's Compensation Appeal Board, 578 A.2d 69 (Pa. Cmwlth. 1990).

The instant case must be decided under the definition of disability in the 1989 Act and not under the concept of incapacity contained in the prior law. We cannot but conclude that the claimant having committed a felony for which he is incarcerated in prison under a 60 year sentence, was completely unable to obtain and retain employment at wages equivalent to his preinjury wage. TIBS are to replace lost wages due to a compensable injury. In this case, actual loss of wages became directly attributable to the claimant's incarceration since he cannot earn wages while incarcerated. In our opinion,

incarceration, and not the compensable injury, has become the reason for the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage. Thus, we affirm the decision of the hearing officer which determines that the claimant did not have disability upon his incarceration in prison on September 19, 1991. We would note, however, that that portion of the hearing officer's conclusion which concludes that the claimant "voluntarily" removed himself from the work force is not necessary to the issue of disability in this case. The claimant's incarceration, plainly involuntary, became, in the hearing officer's determination as finder of fact, the reason for diminished wage.

We distinguish this case from our decision in Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993, which involved continuing disability of a school cafeteria worker after the end of her school year contract in that the employee in that case could have chosen to work had it not been for her compensable injury. In the instant case, the claimant is precluded from work at preinjury wages because of his incarceration.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge