

APPEAL NO. 92688

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). On November 9, 1992, a contested case hearing was held to determine whether the respondent (claimant) was entitled to receive temporary income benefits (TIBS) for the period June 12, 1992 through August 16, 1992. The hearing officer decided that claimant had disability under the 1989 Act from June 12, 1992 through August 12, 1992, and is entitled to TIBS for that period. The hearing officer reached this result by construing claimant's teacher's contract as paying her for services rendered during the school year which ended on June 5, 1992, notwithstanding that she was paid, pursuant to her contract, in 12 monthly installments. The appellant (employer), a self-insured governmental entity which employed claimant, has requested our review contending, in effect, that because employer continued to make monthly payments to claimant during the summer after she concluded her teaching duties, claimant did not suffer any post-injury loss of earnings as a result of her injury and was thus not entitled to TIBS. Claimant urges our support of the hearing officer's decision.

DECISION

Finding no reversible error and the evidence sufficient to support the decision of the hearing officer, we affirm.

The parties stipulated that on _____, claimant was injured in the course and scope of her employment as a teacher with employer; that she did not lose more than seven consecutive days of work time until June 12, 1992; that on June 12, 1992, claimant had surgery necessitated by the injury; that claimant was unable to work until she was released from therapy by her physician on August 12, 1992; and that claimant returned to her work with employer on August 17, 1992. No testimonial evidence was adduced and the documentary evidence consisted of claimant's contracts with employer for the 1991-1992 and 1992-1993 periods of employment. Though not introduced in evidence as a hearing officer's exhibit (as they customarily are), we note the benefit review conference report indicates claimant's injury was to her knee.

Claimant's 1991-1992 contract with employer, signed by claimant on August 21, 1991, and by employer on September 3, 1991, was entitled "Contract of Employment (Term)," and provided in pertinent part as follows:

1. The District employs the Employee to perform such professional duties as may be assigned by the Superintendent for a term of one (1) school year, beginning on the 23rd day of August, 1991, and ending on the 5th day [of] June, 1992, at which time the rights of the District and the Employee will terminate. . . .
2. The District shall pay the employee an annual salary according to the salary schedule adopted by the Board of Trustees, which shall meet

state minimum requirements. Payments will be made in twelve equal monthly payments during the school year.

6. Renewal or nonrenewal shall be in accordance with state law, or Board policy, or for any reason permitted by law. . . .
7. It is agreed and understood by Employee that this is a stated term contract, and no tenure or expectancy of employment after the ending date set forth in Paragraph 1 hereinabove is given or implied by this contract or by any usage, custom, policy or any other reason. By signing this contract, the Employee expressly disclaims any property right to employment by the District beyond the terms hereinabove provided.

On June 1, 1992, claimant signed an identical contract for the school year term beginning on August 17, 1992, and ending on May 28, 1993. The copy of that contract in evidence, however, bore no signature for employer. No policies of employer relating to teachers' contracts were offered into evidence.

The hearing officer found that claimant was injured in the course and scope of her employment on _____; that she did not lose more than seven consecutive days of work time until June 12, 1992, on which date she had surgery necessitated by her injury; that she was unable to work as a teacher from June 12, 1992, until she was released from therapy by her physician on August 12, 1992; that she was capable of obtaining or retaining work as a teacher on August 13, 1992, the day after being released by her doctor; that she returned to her work with employer on August 17, 1992; that she was paid for the 1991-1992 employment period according to the terms of her employment contract; and that she has been or will be so paid for the 1992-1993 employment period. Certain of the hearing officer's factual findings and legal conclusions, as well as his decision and order, follow:

FINDINGS OF FACT

12. There is a conflict between the use of the term "school year" in Paragraph 1 and its use in Paragraph 2; even so, it was the intent of the Claimant and the school district that the Claimant would work for a 92 month period ending on June 5, 1992, but would be paid over a twelve month period, such period presumptively ending on August 23, 1992.
13. The Claimant was not employed by the school district during the period of June 6, 1992, through August 16, 1992.

CONCLUSIONS OF LAW

3. The "remuneration (sic) payable for a given period" as wages, as defined, in this matter had accrued on or before June 5, 1992, the last day of the contract.
4. Even though the contract in question mentions "twelve equal monthly payments during the school year," the "given period" for purposes of computing the Claimant's post-injury "weekly earnings" ended with the contract on June 5, 1992.
5. Any computation of the temporary income benefits, as defined, due the Claimant should not include remuneration (sic), regardless of when paid, for her services rendered on or before June 5, 1992.
6. The Claimant ceased having disability, as defined, on August 12, 1992.

DECISION AND ORDER

The Claimant had disability, as defined, from June 12, 1992, through August 12, 1992, and is entitled to [TIBS], as defined, for that period. The carrier will compute the total amount of accrued income benefits, if any, due and owing the Claimant and pay that amount in a lump sum.

Article 8308-4.23(a) provides that an employee who has disability and who has not attained maximum medical improvement is entitled to TIBS, and that TIBS accrue beginning on the eighth day of disability and are paid weekly. Articles 8308-4.22(a) and (b) provide that weekly income benefits may not be paid for an injury which does not result in disability for a period of at least one week, that if disability extends beyond one week, income benefits begin to accrue on the eighth day after the injury, and that if disability does not follow at once after the injury or within eight days of its occurrence but does later result, then income benefits begin to accrue on the eighth day after the date disability began. "Disability" is defined 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)), and "wages" are defined to include "every form of remuneration payable for a given period to an employee for personal services" (Article 8308-1.03(47)).

We agree with the hearing officer's determination that claimant had disability from June 12th through August 12th, 1992, that is to say, that she was unable during that period to obtain or retain employment at her preinjury wage equivalent because of her compensable injury. The hearing officer reasoned that although claimant continued to receive equal monthly payments during that period, she had already performed all the work she was required to perform under her term employment contract; thus, the salary

payments for the term period had already accrued and were merely due and payable for services already rendered. The hearing officer finds a "conflict" in the employment contract in that it provides for an annual salary in equal monthly payments while requiring the performance of services for less than one year, but he further finds that the parties intended that claimant should work until June 5, 1992, but be paid over a 12 month period.

It seems to us that the underlying issue is whether claimant can be said to have remained employed under her contract during the period she continued to receive equal monthly wage payments after June 5, 1992. If she remained so employed while receiving those payments, she could not meet the definition of disability because she would be retaining employment at her preinjury wage rate; if otherwise, she could have disability. To make this determination, the particular terms of the employment contract must be examined against the backdrop of the Texas statutory schemes for teachers' contracts.

The Texas Education Code provides two statutory schemes for independent school districts to contract for the employment of professional personnel, namely, term contracts (TEX. EDUC. CODE ANN. ' 23.28 (Vernon 1987)) and continuing contracts (TEX. EDUC. CODE ANN. " 13.103 *et seq.* (Vernon 1991)), the latter sometimes referred to as the "tenure plan" (Hix v. Tuloso-Midway Independent School District (489 S.W.2d 706, 709 (Tex. Civ. App.-Corpus Christi 1972, writ ref'd n.r.e.)). The court in Hix observed that the continuing contract statute "applies *only* to teachers who are employed after its effective date [August 27, 1967] and then only if the school board adopts the tenure plan offered thereby." Further, said the Hix court: "The statute is not mandatory on a school district. It is discretionary and permissive. In essence, a school board is given a choice of coming under the Act by adopting the tenure plan set out therein, or continuing to contract under prior existing laws." The Hix court determined that the board of trustees for the school district had not adopted the tenure plan and had not offered the teacher a continuing contract; that the teacher's several written contracts with the school district contained no provision for a continuing contract, renewal, or tenure; that the teacher's last contract secured no interest in reemployment for any term beyond its stated termination date; that the teacher had no legitimate claim or legal expectation of reemployment; and that he had no property or other interest which gave rise to a procedural due process right to a hearing when the school district refused to renew his employment contract. *And see* English v. Hairston, 888 F.2d 1069 (5th Cir. 1989) where the court held that the Term Contract Nonrenewal Act (TEX. EDUC. CODE ANN. " 21.201 *et seq.* (Vernon 1987)) (Act) does not create "a property interest in employment beyond the contract term for Texas teachers employed under term contracts." That court, in commenting on the "procedural safeguards" provided by the Act for teachers whose term contracts are not being renewed, including a requirement that school districts establish policies respecting reasons for nonrenewal, said that "such procedural safeguards do not . . . create a property interest," and noted "the distinction long maintained in Texas law between a teacher's contract for a term and one that is continuing, a distinction the Act is careful to preserve and which is needed in order for the Act to have meaning." The Court refused to read the Act as

equating term contracts with continuing contracts. *Id.* at 1070.

Given the separate statutory provisions for teachers' term and continuing contracts of employment, the refusal of the Texas courts to find that teachers with term contracts have a property interest in reemployment by the school districts (which, in our view, affirms that term contracts expire upon the expiration of the stated term), and the plain language of claimant's term contract evidencing the intent of the parties, we are constrained to view claimant's employment status or relationship with employer as having ended on June 5, 1992, notwithstanding that claimant again commenced employment with employer on August 17, 1992.

We emphasize, however, that a variety of contractual provisions--for both term and continuing contracts--may be agreed to by the contracting parties, and the question whether a school district employee has retained or continued employment during any particular time period may well be determined by the peculiar provisions of the employment contract. Under the facts and circumstances of this case, we find the evidence sufficient to support the hearing officer's finding that claimant was not employed by employer during the period June 6 through August 16, 1992. We believe this is so notwithstanding that in the parties' term contract they agreed that although claimant's obligation to provide services ended on June 5th, commensurate with the expiration of the contract term, claimant's salary for services during the term of the contract was payable in 12 rather than 10 equal installments. We agree with the hearing officer's conclusion that claimant's salary "had accrued on or before June 5, 1992, the last day of the contract," and thus did not constitute wages for the period claimant was not employed by employer. Therefore, because claimant did not "retain employment" with employer between June 6 and August 17, 1992, she could have, and under the stipulated facts in this case, did have disability under the 1989 Act.

In Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993, we considered the case of a school cafeteria employee who was employed by the school district for the school year which began in August 1991 and ended on June 4, 1992. That employee was similarly reemployed for the 1992-1993 school year but, unlike claimant, was paid only during the contract periods. The hearing officer in Appeal No. 92649 determined that the employee did not have disability after June 4th because her inability to obtain and retain employment after that date was the result not of her injury (index finger) but rather the result of her historic work practice of not working during the summer periods between school terms. In reversing the hearing officer's decision and rendering a decision that that claimant had disability from May 19, 1992 until June 16, 1992 (the period the claimant's injured index finger was splinted), the majority of the panel members differed with the hearing officer and said they could 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." In the case we now consider, of course, the parties

stipulated that claimant had surgery on June 12, 1992 and was unable to work until released from therapy by her physician on August 12, 1992. We view the majority opinion in Appeal No. 92649 as precedent for the proposition that a school district employee whose term contract expires at the end of a school term, and who is reemployed the following term under another term contract, does not "retain employment" with the school district under the expired term contract during the interim period between the contracts and, thus, can have disability during that period if such employee cannot obtain or retain employment at the preinjury wage equivalent because of the compensable injury. Article 83008-1.03(16).

The findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge