

APPEAL NO. 93288

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On December 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. After closing the record on January 19, 1993, he determined that appellant (claimant) has had no disability since his incarceration on April 5, 1992, that claimant may not be presumed to have reached maximum medical improvement (MMI) under the provisions of Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.4 (Rule 130.4), and that the carrier is liable to pay for transportation and security guards for claimant to be examined by a designated doctor. Claimant asserts on appeal that disability should continue after incarceration and asks that Texas Workers' Compensation Commission Appeal No. 92674 be overturned. Respondent's (carrier) reply was not timely filed.

DECISION

Finding that the decision of the hearing officer did not err in his interpretation of the law concerning disability for an incarcerated claimant, we affirm.

While the record provided little detail of the claimants' injury, it does indicate that on (date of injury), he fell backward from a height of "three steps" landing on his buttocks. Prior to this injury, he had had back surgery twice. The injury was not disputed. On October 30, 1991, he had surgery to relieve pressure on the spine and to reinforce his prior fusion.

The hearing officer found that claimant was incarcerated on April 5, 1992. He continued to be incarcerated at the time the decision was drafted. Although court records of the trial and sentence are not in the record, documents secured from the County Sheriff establish the beginning date of incarceration and records from the DDC, obtained December 31, 1992, show claimant's presence in that institution. These constitute sufficient evidence to support the hearing officer's finding as to incarceration.

At the hearing, three issues were in dispute: one was the issue appealed, which involves the question of disability; another considered whether the provisions of Rule 130.4 could support a decision that MMI had been reached; the last questioned whether the carrier should pay for guards to accompany claimant to be examined by a designated doctor. Neither of the last two were appealed by either party so the appeals panel will not comment on the findings or decision reached in regard to those two issues.

The claimant argues that incarceration does not overcome claimant's disability stemming from his compensable injury. The hearing officer cites Texas Workers' Compensation Commission Appeal No. 92674, dated January 29, 1993, as authority for his decision that disability ceased at the time claimant was incarcerated because his inability to obtain and retain employment resulted from the incarceration. Appeal No. 92674, *supra*, said in part:

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.

The facts of this case do not provide a basis to distinguish it from those found in Appeal No. 92674, *supra*. In addition, the appeals panel does not choose to change its interpretation of disability relative to incarceration which it reached in that decision, and notes that the effect of incarceration on disability stated in Appeal No. 92674, *supra*, has been followed in unpublished opinions by the appeals panel since that opinion was issued.

The determination of the hearing officer in regard to when disability ceased is based on sufficient evidence and is consistent with the governing statute and appeals panel decisions. The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge