APPEAL NO. 93924

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S arts. 8308-1.01 *et seq*.). A contested case hearing was held in (city), Texas, on September 21, 1993, (hearing officer) presiding as hearing officer. In response to the issues before him, the hearing officer originally determined in a September 21, 1993 decision and order that the claimant was injured in the course and scope of his employment on (date of injury); that that injury was the producing cause of his right hand problems; and that the claimant had disability from April 29, 1993, through July 28, 1993, and is entitled to temporary income benefits (TIBS) for that period less any credits due the carrier in accordance with Commission Rule 129.4 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.4). In a corrected decision and order issued October 11th by the Director, Division of Hearings, but effective as of September 21, 1993, it was determined that the claimant had disability until June 28, 1993. In a brief appeal the appellant, hereinafter claimant, challenges the amended finding as to this date. The respondent, hereinafter carrier, takes the position that it does not owe TIBS for any period of time.

DECISION

We affirm the hearing officer's decision and order.

The claimant, who began working for the (city) American-Statesman newspaper (employer) on September 14, 1992, was injured on (date of injury), when he was struck on the head and knocked to the floor by a bundle of newspapers. The claimant injured his neck in the incident and later discovered a sliver of glass in his hand which was surgically removed. The claimant believed the glass was on the floor when he fell forward with his hands in front of him.

The claimant was originally treated by (Dr. P), who prescribed medication and physical therapy and who released claimant on (date of injury) to modified duty work. The claimant, who had worked as an inserter for employer, was reassigned to filing and clerical work in the editorial library. He said that while his previous job was part time (30 hours per week), he had the ability to work overtime and regularly did so. His pay was $4.25 per hour. Because employer did not allow employees on light or limited duty to work overtime, however, he said he could not continue to support his family, and he resigned from employer on March 19, 1993. Around that time he accepted a job with a grocery store, at $5.00 an hour for a 40-hour week.

Claimant said Dr. P referred him to other doctors, including (Dr. O). On February 22nd, Dr. O noted claimant was on light duty status but stated his return to limited or full-duty work was undetermined, and recommended that claimant undergo further therapy for strengthening. On March 25th, stating that claimant refused further physical therapy, Dr. O discharged claimant from his care and stated, "[h]e is given no work restrictions."

On April 29th claimant began treating with (Dr. H), who on that date took claimant off

work. On a Report of Medical Evaluation (Form TWCC-69) dated July 7, 1993, Dr. H found claimant to have reached maximum medical improvement (MMI) on June 28, 1993, with a zero percent impairment rating.

In his original decision the hearing officer wrote that Dr. H took the claimant off work on April 29, 1993 until July 28, 1993, at which time Dr. H completed a TWCC-69 certifying claimant reached MMI on that date. The hearing officer reasoned that "[Dr. H] would have taken the claimant off work whether he had still been with the employer or not under similar medical conditions. Accordingly, the claimant had disability from April 29, 1993, through July 28, 1993, and the claimant is entitled to temporary income benefits for that period." The corrected decision and order changed all references to the date of July 28, 1993 to June 28, 1993, pursuant to Section 410.206 and Rule 140.5(a), which allows the Commission's executive director or his designee to revise an order to correct a clerical error.

Claimant's very brief appeal appears to challenge the June 28, 1993 date on which the decision finds that his disability ends. In support, he attaches a form filled out by Dr. H, which included a release to full duty, but which was not made part of the record at the hearing. There was no explanation or justification as to why this document could not have been offered into evidence at the hearing. The 1989 Act provides that the Appeals Panel is limited in its consideration of only that evidence which was part of the record before the hearing officer, along with the written request for review and the response thereto. Section 410.203. In considering the request for review, such consideration does not extend to evidence attached thereto that was not made part of the record. Texas Workers' Compensation Commission Appeal No. 92111, decided May 6, 1992. We note, however, that the claimant testified at the hearing that Dr. H released him to full duty work as of July 30, 1993.

Turning to the sufficiency of the evidence to support June 28, 1993, as the date disability ended, we observe that this panel has many times pointed out that disability and MMI are different concepts. Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. As we have also stated, there is no limit on the type of evidence that may be considered in determining disability. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. We find that Dr. H's opinion that claimant reached MMI, particularly with no impairment rating, coupled with claimant's testimony that he was able to work at a different job, is clearly sufficient probative evidence to support the amended date disability ended, or June 28, 1993.

Carrier in its response takes the position that it owes no TIBS for any period of time because, it contends, the claimant earned more while working for the grocery store than he did prior to his injury. The 1989 Act defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The Act further provides that an employee is entitled to TIBS if he has disability and has not attained MMI. Section 408.101(a). The amount of TIBS is equal to a percentage (either 70% or, in the case of an employee who earns less than $8.50 an hour, 75% for the first 26 weeks) of the amount computed by subtracting the employee's

weekly earnings after the injury from the employee's average weekly wage. Section 408.103. The claimant in this case testified regarding his hourly rate of pay and the base number of hours in each job, and also introduced an Employer's Wage Statement setting forth the average weekly wages of a similar employee identified by the employer because claimant was not employed by the employer for 13 continuous weeks prior to the date of injury. *See* Section 408.041. However, the evidence was not clear as to when claimant began working for the grocery store and indeed the carrier states in its response that it is seeking to obtain payroll records from that job. It could be, as the carrier alleges, that no TIBS are owed due to the lack of difference between claimant's preinjury and post-injury wages; however, the lack of evidence available to decide this issue makes it subject to further resolution between the parties.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Thomas A. Knapp
Appeals Judge