APPEAL NO. 94294

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 27, 1994, with (hearing officer) presiding, to determine the following two disputed issues unresolved from the benefit review conference (BRC): 1. Did the Appellant and Cross-Respondent (claimant) have disability from October 21, 1993, to January 21, 1994; and 2. Is the Respondent and Cross-Appellant (employer/carrier) allowed credit for overpayment of temporary income benefits (TIBS) from current TIBS due. Based on a number of factual findings, the hearing officer concluded that claimant had disability from October 21, 1993, to October 26, 1993, and is entitled to receive TIBS for that period; that claimant did not have disability from October 27, 1993, to January 21, 1993 (sic), and is not entitled to receive TIBS for that period; and that the employer/carrier is entitled to take credit for 32 weeks of TIBS paid against any future TIBS or impairment income benefits (IIBS) owed claimant. Claimant challenges the sufficiency of the evidence to support the determination that he did not have disability from October 27, 1993, to January 21, 1994, stating that he was unable to find employment and was still under a doctor's care. Claimant also disputes the hearing officer's determination that the employer/carrier is entitled to take a credit for 32 weeks of overpaid TIBS against any future IIBS owed claimant, contending that such was not a disputed issue before the hearing officer but was merely part of a discussion. The employer/carrier's response first contends that claimant's appeal was not timely filed and then asserts the sufficiency of the evidence to support the challenged disability and income benefits credit determinations, asserting that the parties had "agreed" that such was an issue before the hearing officer.

The employer/carrier also filed a timely appeal pointing out that Conclusion of Law No. 3 stated both that claimant had disability from October 21, 1993, to October 26, 1993, and that he was entitled to TIBS for that period and that such determination was also reflected in the hearing officer's Decision and Order. The employer/carrier seeks reformation of so much of that determination as provides that the claimant was entitled to TIBS for that six day period of disability, pointing out that the decision in claimant's prior hearing held on October 4, 1993, which was affirmed by the Appeals Panel, determined that claimant did not have disability from his date of injury to the date of that decision. Thus, asserts the employer/carrier, the six days of disability between October 21st and October 26th found by the hearing officer in this case were the first six days of claimant's disability and Section 408.082(a) of the 1989 Act provides that TIBS are not payable unless the injury results in disability for at least one week. Claimant responded to oppose the employer/carrier's request for relief.

DECISION

Affirmed as modified.

Pursuant to the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3), claimant's request for review is presumed to be timely filed if mailed on or before the 15th day after the date he received the hearing officer's decision and received by

the Texas Workers' Compensation Commission (Commission) not later than the 20th day thereafter. According to the records of the Commission, the hearing officer's decision was distributed to the parties on February 24, 1994. Claimant stated that he received the decision on March 5, 1994, and thus to be timely filed, claimant's request for review must have been mailed on or before March 20, 1994, and have been received by the Commission on or before March 25, 1994. Claimant's appeal was mailed on March 21, 1994, and received by the Commission on March 22, 1994. However, because March 20, 1994, was a Sunday, claimant's mailing of his appeal on March 21st was timely under Rule 102.3(a)(3) and thus his appeal was timely filed. *See* Texas Workers' Compensation Commission Appeal No. 94062, decided March 1, 1994.

The parties stipulated that on (date of injury), claimant was compensably injured while employed by the employer/carrier, that his last day of work was the date of his injury and he is no longer working for employer/carrier, and that he reached maximum medical improvement (MMI) on January 21, 1994. At a prior contested case hearing held on October 4, 1993, the hearing officer took evidence on the sole disputed issue, namely, whether claimant had disability resulting from his (date of injury), injury entitling him to TIBS and, if so, for what period. According to that hearing officer's Statement of Evidence in his Decision and Order, the claimant "asserted that his present distress is the result of his having been kicked and knocked down by a special education student on (date of injury)." (The evidence adduced at the prior hearing was not re-introduced nor incorporated into the record of the hearing we here consider.)

Section 401.011(16) defines disability to mean "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." In the earlier case, the hearing officer in his Decision and Order signed on October 13, 1993, concluded that "Claimant does not now nor has he ever suffered disability as a result of an injury incurred in the course and scope of his employment on (date of injury)." The Appeals Panel affirmed the hearing officer's decision in that case in an unpublished decision. Texas Workers' Compensation Commission Appeal No. 93993, decided December 15, 1993. The Appeals Panel in that decision noted that claimant's appeal stated he had surgery on October 21st, that he was requesting benefits from September 4 through October 20, 1993, and that he limited the dispute to income benefits between September 4, 1993, and October 21, 1993. The Appeals Panel also observed that "[d]isability as a basis for [TIBS] can come and go, so that a period of disability can follow a period in which disability is not found. *See* Appeal No. 91122, *supra*. [Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992.]" Because the hearing officer's decision in the first case considered evidence of disability to October 4, 1993, the date of the hearing, and because in the case we now consider claimant seeks a determination of disability from October 21, 1993, the date of his surgery, to January 21, 1994, the date he reached MMI, there has been neither an assertion nor an adjudication of disability during the period from October 4 through October 20, 1993.

According to the medical records and claimant's testimony, on October 21, 1993, claimant's current treating doctor, (Dr. S), performed a "diagnostic and operative arthroscopy

with removal of loose body and chondral shaving" on claimant's left knee. His diagnosis was "left knee internal derangement." While acknowledging that Dr. S's report of that date stated he was "released with full weightbearing and no immobilization of the knee joint short of what the pain dictates," claimant nevertheless maintained that he was given crutches and that his knee was splinted. He said he returned to Dr. S on October 26, 1993, at which time the stitches were removed and the splint discarded. Dr. S's notes of that visit reflected the absence of knee joint effusion, better than 90 degrees flexion, and full extension. Claimant was allowed to walk and the only restriction imposed by Dr. S was to avoid submersion of claimant's knee in anything but the shower to avoid stitch area irritation. Thereafter, claimant said his treatment consisted of exercise and taking Tylenol with codeine on an as needed basis. He said he took it every day. On November 23, 1993, Dr. S signed a note stating claimant "continues to be unable to work." Claimant returned to Dr. S on November 30, 1993, for a scheduled check-up and was given some liniment to relieve residual symptoms. When claimant next saw Dr. S on January 21, 1994, for a scheduled check-up, Dr. S determined that claimant had reached MMI on that date with a "15% permanent physical impairment of the whole person." He was given more liniment and told to return in three months for a follow-up visit.

Claimant testified that despite his MMI determination Dr. S had not yet released him to return to work teaching and said he had neither worked nor looked for work since his injury date because he felt he was not able to work. Claimant acknowledged having received his full teaching salary for the 1992-1993 school year and stated that such was required to be paid in addition to workers' compensation income benefits. Claimant maintained he had disability from and after his October 21st surgery for the reasons that he remained under his doctor's care, that he was at risk of falling as he occasionally did, that the Tylenol with codeine caused drowsiness and adversely affected his ability to teach, and that he could not stand for more than approximately one and one-half hours nor sit for more than approximately one hour without pain. (Mr. R), who had been employed by the employer/carrier in teaching and related positions for 23 years, testified that claimant's stated standing and sitting restrictions would not render him unable to teach pointing out that employer/carrier had teachers in wheelchairs, a teacher with Muscular Dystrophy, and a variety of technical classroom devices to aid teachers. He also stated that teachers can sit, stand, and move around at will in the classroom.

The hearing officer found that claimant had disability from October 21 to October 26, 1993, due to his arthroscopic surgery, and concluded that claimant had disability for that period and was entitled to TIBS for that period. The carrier's appeal asserts that claimant was not entitled to receive TIBS for that particular period since the record shows that that period was the first period of disability claimant had for his (date of injury), injury. Section 408.082(a) provides that income benefits may not be paid for an injury that does not result in disability for at least one week. Section 408.082(b) provides that if the disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury, and that if the disability does not begin at once after the injury occurs or within eight days of its occurrence but does result subsequently, then weekly income benefits accrue on the eighth day after the date on which disability began.

However, we cannot agree with the carrier's appeal and grant the relief sought by the carrier because the record does not establish whether or not claimant had disability during the period October 4 through October 20, 1993. As already noted, the hearing officer's decision in the prior case determined that claimant did not have disability from the date of his injury to, apparently, October 4, 1993, the date the hearing was held, and that decision was affirmed by the Appeals Panel. The "Decision" in the earlier case stated: "Claimant does not now nor has he ever had disability resulting from an injury incurred in the course and scope of his employment on (date of injury). The Claimant is not entitled to [TIBS] until he can establish disability." Because we do not know from the record whether claimant had disability during the period from October 4 through October 20, 1993, we do not reform Conclusion of Law No. 3 and the Decision and Order to reflect that claimant is not entitled to TIBS for the period from October 21, 1993, to October 26, 1993.

The hearing officer also found that claimant "was able to obtain and retain employment after October 26, 1993, as a school teacher but chose not to seek employment in that capacity or in any capacity" and concluded that claimant did not have disability from October 27, 1993, to January 21, 1994, and is not entitled to receive TIBS for that period. We are satisfied the evidence supports this determination. Claimant's period(s) of disability, if any, presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) and, as the finder of fact, resolves conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), including medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951). The Appeals Panel has said that a claimant "must be able to show a causal connection between his diminished wages and the compensable injury." Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. While Dr. S's note of November 11, 1993, stating that claimant continued to be unable to work was evidence to be considered on the disability issue, it was not binding on the hearing officer. The hearing officer could consider the testimony of Mr. R, the content of Dr. S's records of October 26 and November 30, 1993, and January 21, 1994, and conclude that it was not as a result of his (date of injury), injury, and the October 21, 1993, arthroscopic surgery that claimant was unable to obtain or retain employment at his pre-injury wages after October 26, 1993.

The hearing officer also made the following findings and conclusion:

FINDINGS OF FACT

9.The Commission's Appeals Panel has determined that a Self-Insured Employer can take credit for an overpayment of [TIBS] paid in good faith against any [TIBS] owed.

10.The Claimant's treating doctor has assessed the Claimant's percentage of whole body impairment as fifteen percent (15%) which, if undisputed by the Self-Insured Employer, would entitle him to receive forty-five (45) weeks of [IIBS].

11.The Commission's Appeals Panel has determined that a Self-Insured Employer can take credit for an overpayment of [TIBS] paid in good faith against any [IIBS] owed.

12.The Self-Insured Employer can take credit for thirty two (32) weeks of [TIBS] paid against its reasonable assessment of [IIBS] owed if the Self-Insured Employer does not agree with the percentage of whole body impairment of fifteen percent (15%) assessed by the treating doctor.

CONCLUSIONS OF LAW

5.The carrier is entitled to take credit for thirty two (32) weeks of [TIBS] paid against any future temporary or impairment benefits owed.

In her Decision and Order the hearing officer stated in part: "It is further ORDERED that the Carrier is entitled to recoup the overpayment of thirty-two (32) weeks of [TIBS] paid prior to October 4, 1993, from any temporary or impairment income benefits owed; . . . "

The hearing officer also stated the following in the discussion portion of her decision:

Although not before the Hearing Officer for resolution, the treating doctor has assessed a fifteen percent (15%) whole body impairment, which, if not contested within ninety (90) days, would entitle the Claimant to forty-five (45) weeks of impairment income benefits after the date of maximum medical improvement. If the Self-Insured Employer contests this percentage of whole body impairment, it is required by statute to pay impairment income benefits according to its reasonable assessment of the Claimant's percentage of whole body impairment which would entitle the Claimant to receive three (3) weeks of impairment income benefits for every percentage point. If the Self-insured Employer accepts the fifteen percent (15%) whole body impairment, the Self-Insured Employer would be entitled to take credit for the thirty-two (32) weeks of temporary income benefits it paid against any impairment income benefits owed; or, it would be entitled to take credit for those weeks against its reasonable assessment of impairment income benefits owed. The Claimant would be entitled to receive supplemental income benefits if his percentage of whole body impairment were fifteen percent (15%) or greater and he could prove his entitlement to them.

The issue from the BRC concerning the employer/carrier's overpayment of TIBS related to its taking a credit for such against future TIBS. There was no addition of an issue

pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) concerning the taking of a credit against IIBS should the claimant become entitled to IIBS at a future time. In its opening and closing statements the carrier spoke of taking a credit against "any other income benefits," "against anything that might be owed from the period that is in dispute today," and "towards any benefits that might be due." The claimant, however, argued that the issue was whether or not a credit could be taken against future TIBS stating "and that is what were here today, because that's the only type of benefits we're talking about right now, TIBS." The record does not disclose that the parties agreed to expand the issue as it came from the BRC to include the taking of a credit against future IIBS. The claimant also pointed out that the amount of the impairment was not yet determined. Claimant also urged the hearing officer not to award a credit for overpaid TIBS against future TIBS because there was no interlocutory order at the first hearing permitting the carrier to stop paying TIBS.

In addition to appealing the adverse disability determination, we read claimant's request for review as limiting his appeal to so much of the hearing officer's decision as would permit the employer/carrier to take a credit against IIBS, pointing out that such was not an issue before the hearing officer, and as not appealing the determination that employer/carrier can take a credit against TIBS, should any ever become due. Accordingly, we need not decide the correctness of the hearing officer's determination permitting a credit against future TIBS.

We agree with the claimant that the disputed issue at the hearing concerning the employer/carrier's taking a credit for overpayment of TIBS was limited to a credit against future TIBS and not IIBS. Accordingly, Finding of Fact No. 12 is disregarded as surplusage and unnecessary to the decision and Conclusion of Law No. 5 and the Decision and Order are reformed to strike the words "or impairment." We observe that the Appeals Panel has approved the taking of credits by carriers against IIBS due claimants in certain limited circumstances. *See e.g.* Texas Workers' Compensation Commission Appeal No. 94134, decided March 16, 1994, and Texas Workers' Compensation Commission Appeal No. 94135, decided March 16, 1994.

The decision and order of the hearing officer, as modified, are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge