APPEAL NO. 94659

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 14, 1994, a contested case hearing was held. The issue to be determined was the date of accrual for income benefits to be paid to the appellant, BM, the claimant herein, who was injured on _____, while employed as a state trooper by the (employer).

The hearing officer determined that the date of accrual for claimant's benefits was on March 26, 1991, which was the eighth day after he began to lose time from work due to his compensable injury. She determined that the claimant elected to exhaust his accrued sick leave when he began to lose time from work prior to receiving workers' compensation income benefits. However, this decision did not have the effect of changing the beginning date of accrual for benefits.

The claimant appeals the determinations of the hearing officer, arguing that he has been treated unfairly. It is his position that the date of accrual should be sometime in July 1992, after he began to receive workers' compensation benefits, and that he would not have made the election to exhaust sick leave had he realized this period would be included in the 104 week period of post-accrual eligibility for temporary income benefits (TIBS). The carrier responds that this result is the intent of the Legislature and the effect of applicable law.

DECISION

We affirm the decision and order of the hearing officer, and correct typographical errors in a finding of fact and conclusion law.

Claimant was employed as a state trooper by the (employer), a state agency self-insured through the Director, State Employees Workers' Compensation Division (who is the respondent carrier), in accordance with the Texas Labor Code, Section 501.001 *et seq.* On _____, which claimant recalled as a Friday, he injured his back when he slipped and fell. He stated that it was the following Monday or Tuesday that he was first able to see a doctor. He was off work from March 18, 1991, until May 6, 1991, at which time he returned to work for about a year until May 6, 1992, when his injury again caused him to begin missing time from work. According to other evidence in the case, claimant went on sick leave again from May 6, 1992, through July 2, 1992, and then began receiving workers' compensation income benefits. The claimant was granted extended sick leave benefits from the agency sick leave "pool" to cover the period from November 10, 1992, to March 31, 1993. (The claimant disputed that the "pool" leave effectively began earlier than January 1993.) The evidence also indicated that the carrier mistakenly paid TIBS to the claimant for the period from April 1, 1993, through December 5, 1993, and these amounts were credited against an impairment income benefits (IIBS) obligation, the claimant has had three surgeries and stated that he was forced to retire.

At the heart of the controversy is an agreement that claimant signed on March 25, 1991, entitled "Employee Election of Receiving Workers' Compensation Disability Payments per Section 12 of Article 8309g." In accordance with Section 501.044 (formerly the section referred to in the title of the form), claimant elected to be paid for lost time from work by using his accrued sick leave, at full pay, before drawing workers' compensation. The election agreement he signed stated that he understood he could not draw workers' compensation until his sick leave was exhausted. Also contained on the same form was the option to draw workers' compensation immediately instead of taking accrued sick leave.

Claimant contended he was misinformed and would not have signed the election to go on sick leave if he understood that the 104 weeks of eligibility would begin before he began accepting payment of workers' compensation. He stated that the misinformation he received, both from the employer and employees of the Texas Workers' Compensation Commission (Commission), was that he could begin to get workers' compensation after he was off sick leave. Claimant did not testify that he was expressly told at any time that, in his situation, he would be permitted to draw a full 104 weeks of workers' compensation after sick leave was exhausted.

The relevant sections are:

SECTION 401.011(16): "Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

SECTION 401.011(30): "Maximum medical improvement" means the earlier of: . . . (B) the expiration of 104 weeks from the date on which income benefits begin to accrue.

SECTION 408.081(b): (b) *Except as otherwise provided by this subtitle*, income benefits shall be paid weekly as and when they accrue without order from the commission [emphasis added].

SECTION 408.082(b): 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. . . .

SECTION 409.023(a): An insurance carrier shall continue to pay benefits promptly as and when the benefits accrue without a final decision, order, or other action of the commission, *except as otherwise provided* [emphasis added].

SECTION 501.044. EFFECT OF SICK LEAVE: An employee may elect to use accrued sick leave before receiving income benefits. If an employee elects to use sick leave, the employee is not entitled to income benefits under this chapter until the employee has exhausted the employee's accrued sick leave.

TEXAS GOVERNMENT CODE § 661.007 (1994): An employee absent on time withdrawn from the sick leave pool may use the time as sick leave earned by the employee, and the employee is treated for all purposes as if the employee were absent on earned sick leave.

The "misinformation" that claimant referred to, that he could not draw benefits until he exhausted his sick leave, was actually correct under the circumstances of his case. An injured employee for the state may not receive both sick leave pay and workers' compensation at the same time. What we believe claimant contends he was not told was information about the duration of benefits for which he would be eligible. The evidence indicated that claimant assumed his income benefits would accrue the day he began to draw them, but was not expressly advised this would be the case. The hearing officer concluded, we believe correctly, that his failure to understand all implications of an election to receive accrued sick leave would not invalidate the election. Likewise, the fact that employees of either the carrier or the Commission may have been mistaken about provisions of the law does not change the effect of applicable statutes.

Although the previous workers' compensation law was reformed by the 1989 Act in several respects, the provision relating to the state employee election is unchanged from prior law. This statute, and the effect of the election on the 401 week limit for drawing income benefits was considered in Director, State Employees Workers' Compensation Division v. Bass, 703 S.W.2d 397 (Tex. App.- Beaumont 1986, no writ). The court reversed a jury award of 401 weeks of benefits from the date sick leave was exhausted. The court held instead that the election statute was unambiguous, and when read in conjunction with the statute which started eligibility for workers' compensation on the date of injury, that the overlapping period must be excluded from the period for which benefits would be paid.

The 1989 Act changed in the respect that benefits accrue from the eighth day of disability, as defined above, and in setting a 104 week limit from the accrual date for reaching maximum medical improvement. In reviewing the statute as a whole, we do not believe that it was the intent of the Legislature that the status of "disability" be postponed until after accrued sick leave (including leave from the "pool" which is treated as earned sick leave according to TEXAS GOVERNMENT CODE § 661.007). The need for an election presupposes that the injured worker is also eligible for workers' compensation benefits. Sections 408.081(b) and 409.023(a) indicate that the Legislature realized that

there could be situations when benefits may "accrue," but not be payable weekly. This is such a situation.

Finally, the sick leave pay that claimant received was not wages for current personal services rendered to the employer, but was based on his pre-injury services to his employer. For these reasons, we believe that the election in favor of sick leave does not shift the date of accrual of benefits for purposes of ascertaining when maximum medical improvement is reached under Section 401.011(30)(B), and that the rationale articulated in the Bass case applies also to the 1989 Act.

We note that appellant has correctly noted tammihat Conclusion of Law No. 3 uses an erroneous date, March 23, 1993, as the date benefits accrued. The correct date, March 26, 1991, is set out in the order, and we therefore correct the typographical error in the conclusion of law to March 26, 1991, as the date claimant's TIBS accrued. In addition, Finding of Fact No. 6 contains another typographical error, in that it states that claimant was unable to work "from March 18, 1991 until May 6, 1992;" this should be corrected to "May 6, 1991." In so far as claimant's contentions of unfairness have to do with the lack of prompt response from the carrier to telephone calls (which was also brought up at the hearing), while it would not affect the outcome of this case, we would hope that the carrier has taken steps necessary to ensure adequate claims servicing in compliance with Section 406.010.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

For these reasons, we affirm the hearing officer's decision and order, and correct the typographical errors made in Finding of Fact No. 6 and Conclusion of Law No. 3.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge