

APPEAL NO. 950753  
FILED JUNE 23, 1995

Pursuant to 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 April 18, 1995, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) had disability during the period beginning \_\_\_\_\_, and ending December 15, 1994, and that temporary income benefits (TIBS) began to accrue on December 15, 1994. Appellant (carrier) appeals urging that claimant did not lose any wages until December 19, 1994, and that TIBS did not accrue until December 26, 1994. Claimant responds asking that the hearing officer's decision be affirmed.

DECISION

Finding error, the hearing officer's decision and order are reversed.

The claimant, a data entry operator for the Texas Workers' Compensation Commission (Commission), testified that she noticed neck pain and tingling in her arm and fingers and went to her family doctor on \_\_\_\_\_, taking 30 minutes of sick leave.

It was apparently determined at some point that she had a repetitive trauma injury and the carrier did not contest that it was a compensable injury. In any event, she continued working and, after \_\_\_\_\_, periodically had doctor and therapy appointments and filed sick leave requests as follows: \_\_\_\_\_ 6--1 hour; September 22--30 minutes; September 23--1 hour; October 13--1 hour and 30 minutes; October 14--8 hours, November 3, 1994--2 hours and 30 minutes; December 15--2 hours; December 19--8 hours. She testified that she received her full pay throughout this period but that her pay included her accrued sick leave for the periods set out above. She stated that while at the appointments she did not do any work for or further the business of her employer. She stated that she had some surgery on December 19, 1994, and was off work for three weeks and one day. She subsequently worked half days for a period and then continued full-time work but only worked on a keyboard four hours per day.

On December 31, 1994, the claimant's supervisor and friend visited her and brought a form entitled Employee's Election Regarding Utilization of Sick Leave and the claimant signed indicating her election to receive weekly payments of workers' compensation after the seven day waiting period (apparently referring to Section 408.082(a) which provides that income benefits are not paid for an injury that does not result in disability for at least one week) and indicating a desire to use sick leave for the waiting period. The carrier has paid TIBS with an income benefits accrual date of December 26, 1994, the eighth day after the claimant stopped work and had disability.

The hearing officer found that the claimant missed work and took sick leave for the time periods outlined above (\_\_\_\_\_ through December 15, 1994) due to her \_\_\_\_\_, injury. He also found that she was unable to obtain and retain employment at her preinjury wage due to her injury for the same periods and consequently

had disability during the period of \_\_\_\_\_, and December 15, 1994, and that TIBS began to accrue on December 15, 1994.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Wages includes "all forms of remuneration payable for a given period to an employee for personal services." Section 401.011(43). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.1 (Rule 128.1) provides that for purposes of figuring average weekly wage, wage includes, but is not limited to the amount paid for "time off such as holidays, vacation and sick leave." Apparently, the position is advanced that during the periods that the claimant was at the doctor or at therapy, she could not obtain or retain employment at wages equivalent to her preinjury wage, rather, requested sick leave, and thus had disability. The evidence clearly shows that the claimant continued to hold her full time employment position during the period from \_\_\_\_\_ through December 15th and received no reduction in her pay, requesting and utilizing her sick leave benefit for the some 17 hours during the three and one half months that she obtained treatment. There is no evidence that she received any less wages during that time although it is apparent she also utilized the sick leave benefit. To the contrary, the claimant acknowledged she received her usual pay during the period and that her pay from her employer was only reduced when she was off work for her surgery and recovery.

Under the setting of this case, it is not necessary to reach the question of whether a person qualifies as having disability under the definition of the 1989 Act for a 30 minute or one hour period during a normal work day when attending a doctor's appointment related to an on the job injury. Here, the claimant continued to hold (retain) the same employment and there simply was no reduction in pay during the period, regardless of which part of the claimant's pay and benefits package made up her wage for the period. It would be contrary to the definition of disability under the 1989 Act to hold that the claimant had disability in such circumstances, that is, that she was unable to retain employment at equivalent wages. While we have stated that disability is not postponed until an employee exhausts his or her sick leave (Texas Workers' Compensation Commission Appeal No. 94659, decided July 5, 1994), that holding does not affect the status of disability as defined in the 1989 Act.

Of course, the determination of disability and when it begins has very far reaching effects on benefits under the 1989 Act. Section 408.082 provides in pertinent part that if disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of the injury. And, we have held that there is but one accrual date. Texas Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993. Rule 124.7 defines accrual date as the day an injured worker's income benefits begin to accrue and defines "Day of Disability" as a day when the worker is unable to obtain and retain employment at wages equivalent to the preinjury wage. Intermittent days are cumulated to calculate the accrual date. The importance of the accrual date

goes to such future matters as determining the end of TIBS and the date of maximum medical improvement (MMI). Appeal 93678, *supra*; Section 408.101. It is not difficult to envision a detrimental result from a claimant's perspective where an early accrual date is established based on circumstance similar to those in this case. For example, in the event a claimant was totally unable to work as a result of the injury or a serious set back at some time in the future, an early accrual date resulting from a series of short periods of time off work might well mandate a shortened period of TIBS and an early MMI date. We have doubts that the term and definition of disability under the 1989 Act was ever intended to be so narrowly applied.

The evidence in the case before us shows that the claimant retained her employment at wages equivalent to her preinjury wage and was paid her preinjury wage until December 19, 1994. Therefore, her date of disability began on December 19, 1994, and the carrier, pursuant to Section 408.082, paid her TIBS starting on December 26, 1994. The claimant testified that she had surgery on December 19th and was subsequently off work for three weeks and one day. Under the circumstances presented in this case, the evidence only supports the conclusion that the first day of disability was December 19, 1994, and the accrual date was December 26, 1994. Accordingly, we reverse the decision and order of the hearing officer and render a new decision that the claimant had disability beginning on December 19, 1994, and that TIBS began to accrue on December 26, 1994.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge