

## APPEAL NO. 970672

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 19, 1997. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury to both hands on injury 1; that she did not sustain a compensable injury to her neck and shoulders; that the appellant (carrier) is not permitted to reopen the issue of compensability based upon newly discovered evidence; and that the claimant had disability from July 3, 1996, through the date of the hearing. In its appeal, the carrier challenges only the hearing officer's disability determination. In her response, the claimant urges affirmance. Neither party appealed the hearing officer's determinations that the claimant sustained a compensable injury to both hands but did not sustain a compensable injury to her neck and shoulders or his determination that the carrier was not permitted to reopen the issue of compensability based on newly discovered evidence and those determinations have become final under Section 410.169.

### DECISION

Affirmed in part and reversed and remanded in part.

Because only the disability issue is before us on appeal, our factual recitation will be abbreviated. In unappealed findings, the hearing officer determined that the claimant sustained a bilateral hand injury in the course and scope of her employment as an office manager for an insurance agent. The date of injury is injury 1. The claimant has been diagnosed with carpal tunnel syndrome (CTS). She testified that she continued to work after injury 1, until Dr. H, her treating doctor, took her off work for the period of December 19 to December 26, 1994. She stated that she returned to work, thereafter, and that she occasionally missed days from work due to her injury. However, she could not recall with specificity any of the days that she missed work. The claimant testified that she was paid for the time she was off in December 1994 and for her intermittent days off that followed either by using her accrued sick time or vacation days. She stated that her employer accommodated her by purchasing a headset so that she would not have to hold the receiver when she spoke on the telephone and by not requiring her to do any typing. Finally, the claimant stated that on July 3, 1996, Dr. H again took her off work because her job had been restructured to again require typing, which she was not physically capable of doing. She stated that Dr. H had not returned her to work as of the date of the hearing.

The hearing officer determined that the claimant had disability from July 3, 1996, through the date of the hearing. In the discussion section of his decision and order the hearing officer acknowledged that the claimant testified that she missed time from work in December 1994; however, he emphasized that "at no time was her pay reduced or her employment jeopardized." In its appeal, the carrier does not assert error in the determination that the claimant could not obtain or retain employment for the period from July 3, 1996, through the date of the hearing as a result of her compensable injury when she had been taken off work by her treating doctor. Rather, the carrier maintains that the

claimant's disability accrued on December 26, 1994, the eighth day of her disability and that the hearing officer "failed to properly decide the issue of disability under the facts of the present case in light of these considerations." Given that there is no challenge to the hearing officer's determination that the claimant could not obtain and retain employment at her preinjury wage because of her compensable injury from July 3, 1996, through the date of the hearing, we affirm the hearing officer's disability determination.

Our affirmance of the determination that the claimant had disability from July 3, 1996, through the date of the hearing does not end the inquiry in this case. The questions of whether the claimant has disability and whether the carrier is liable for temporary income benefits (TIBS) are separate questions under the 1989 Act. Section 408.101 provides that a claimant is entitled to TIBS if he or she has disability and has not attained maximum medical improvement (MMI). Pursuant to Section 401.011(30)(B) an injured worker reaches MMI by operation of law upon "the expiration of 104 weeks from the date on which income benefits begin to accrue." The claimant stated that Dr. H took her off work from approximately December 19 to December 26, 1994, because of her compensable injury. The carrier argues that December 26, 1994, was the claimant's eighth day of disability and, thus, that her income benefits accrued on that date. The hearing officer did not make a finding as to the benefits accrual date. However, from the portion of his decision quoted above, it appears that the hearing officer determined that the claimant did not have disability in the period of time that she missed work in December 1994 and intermittently thereafter because her pay was not reduced and her employment was not jeopardized. The fact that the claimant was paid for her time off in December 1994, from a combination of accrued sick leave and vacation time, does not mean that the claimant did not have disability in that period or that those days off are not counted for purposes of determining the accrual date of the claimant's income benefits. In Texas Workers' Compensation Commission Appeal No. 94659, decided July 5, 1994, the Appeals Panel determined that the claimant's entitlement to income benefits accrued on the eighth day after he began missing time from work, despite the fact that, as a state employee, he elected to exhaust his accrued sick leave prior to receiving workers' compensation benefits. Appeal No. 94659 concluded:

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.

Similarly, in Texas Workers' Compensation Commission Appeal No. 941073, decided September 26, 1994, we concluded that a claimant had disability during the period of time that he was paid under the employer's salary continuation policy based upon the determination that those payments were not wages for personal services. See also Texas Workers' Compensation Commission Appeal No. 941180, decided October 11, 1994

(claimant had disability for the period of time that the employer paid him under a salary continuation plan). We have also previously affirmed a determination that the claimant had disability in the period of time that the claimant received short-term disability benefits from the employer. Texas Workers' Compensation Commission Appeal No. 951249, decided September 13, 1995. Although this case is somewhat different from Appeal Nos. 951249, 941073 and 94659, the reasoning in those cases is equally applicable herein. The fact that the employer continued to pay the claimant for her lost time until July 3, 1996, does not alter the fact that she began losing time from work because of her compensable injury on Injury 2. Thus, the dates that the claimant missed work prior to July 3, 1996, because of her injury are to be counted in determining the accrual date of the claimant's income benefits. The claimant testified that she was taken off work from December 19 to December 26, 1994, and that she missed various days from work thereafter, until July 3, 1996, when she was again taken off work by Dr. H. It is not clear from the claimant's testimony whether she returned to work on December 26th or whether she did not work on that date. In this instance, the hearing officer erred in not considering the time that the claimant missed work because of her compensable injury before July 3, 1996, in determining the accrual date of her income benefits. Therefore, we reverse the order that the carrier pay TIBS for the period of disability found by the hearing officer and remand the case to the hearing officer for a determination of the eighth day that the claimant missed work because of her compensable injury. That date is the claimant's accrual date of her income benefits. It is the operative date for determining the date the claimant reached statutory MMI and consequently, for determining the claimant's entitlement to and the carrier's liability for TIBS related to the disability period found by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Robert W. Potts  
Appeals Judge