

## APPEAL NO. 001848

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 20, 2000; it was recessed and reconvened on July 13, 2000. The hearing officer determined that the appellant's (claimant) compensable injury of \_\_\_\_\_, extends to and includes a cervical strain or sprain; and that the claimant had disability from November 12, 1999, through February 16, 2000, and from March 7, 2000, through July 13, 2000. The claimant has appealed the hearing officer's determination on disability, contending that the determination of the periods of disability is against the great weight and preponderance of the evidence. The respondent (carrier) asserts in response that the hearing officer's decision is supported by the evidence and requests that the decision be affirmed.

### DECISION

Reversed rendered in part and reversed and remanded in part.

In a decision and order dated July 14, 2000, the hearing officer found that the claimant's compensable injury of \_\_\_\_\_, includes a cervical injury and that the claimant had certain periods of disability as a result of the compensable injury. The portion of the decision finding that the claimant's injury includes the cervical spine has not been appealed and that portion of the decision has become final.

The claimant appeals the hearing officer's decision regarding disability in two points of error which are stated as follows:

### POINTS OF ERROR

**POINT OF ERROR #1:** The Hearing Officer's decision concerning the Claimant's period of disability is against the great weight of the evidence.

**POINT OF ERROR #2:** The Hearing Officer's refusal to allow more evidence to be admitted when the contested case hearing was resumed was error.

The CCH in this matter was initially convened on June 20, 2000, and was recessed on that date because the hearing officer determined that the claimant was unable to actively participate and comprehend the proceedings. During the June 20, 2000, portion of the hearing, documentary evidence was offered by each party and was admitted without objection. The hearing was reconvened on July 13, 2000. The claimant alleges that the hearing officer refused to admit into evidence a work slip from Dr. G and medical records from Dr. D, as well as the results of a myelogram.

During the hearing on June 20, 2000, the claimant offered a return-to-work/school slip from Dr. G dated February 16, 2000, which states Dr. G saw the claimant on that day for the flu. The document was admitted without objection. If this is the document which

the claimant refers to in his appeal, he is in error that the document was excluded. On June 20, 2000, the claimant also offered three pages of records from Dr. D, which were the result of the claimant's initial visit to Dr. D on March 10, 2000. The record in this matter indicates that the claimant did not offer any documentary evidence on July 13, 2000, nor did he offer any documents on June 20, 2000, other than those offered and admitted into evidence as reflected in the decision and order. The claimant's second point of error, being unfounded, is overruled.

The hearing officer determined that the claimant had disability beginning on November 12, 1999, and continuing through February 16, 2000, and again beginning on March 7, 2000, and continuing through July 13, 2000. The determination of the dates of disability and the order for the payment of temporary income benefits (TIBs) for the dates of disability as set forth in the decision and order appear to be founded on the following findings of fact:

### **FINDINGS OF FACT**

3. The medical records presented show the Claimant was able to work, beginning October 9, 1999, and ending November 12, 1999, when [Dr. A] stated that the Claimant was unable to work.
4. The Claimant did not appear for an independent medical evaluation [IME] with [Dr. W] scheduled to occur on February 16, 2000; [Dr. W], M.D., was the Carrier's choice of doctor.
5. The Claimant did not provide a believable explanation for his failure to appear for the examination with [Dr. W], M.D., on February 16, 2000.
6. The Claimant was examined by [Dr. W], M.D., on March 7, 2000.
7. The rules of the Commission [Texas Workers' Compensation Commission] provide that a Carrier may cease [sic] the payment of [TIBs] if an injured worker does not appear for an [IME] requested by the Carrier without good cause.
8. The Carrier did not pay [TIBs] for a short period, beginning February 16, 2000, and ending March 1, 2000, because the Claimant did not attend the [IME] of [Dr. W], M.D. on February 16, 2000.
9. No medical records concomitant with the CCH show the Claimant is unable to work due to his low back injury or due to any injury to his neck.

10. The medical records presented preponderate to show or otherwise establish that the Claimant was capable of returning to work in spite of his injury on or about the date of the CCH.

Although the issue reported out of the benefit review conference was whether the claimant had sustained disability resulting from the compensable injury of \_\_\_\_\_, the hearing officer seems to equate disability with the carrier's obligation to pay TIBs. That premise is fraught with pitfalls; pitfalls which the hearing officer, the claimant, the ombudsman, and the carrier's representative seem to have ignored. Disability is defined by statute 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 hearing officer's conclusion that the claimant did not have disability from February 17, 2000, through March 6, 2000, is contrary to the great weight and preponderance of the evidence. The claimant's condition before and after that period were such that the hearing officer found disability. There is no indication in the record that there was any change in the claimant's condition during that period. We therefore reverse the hearing officer's finding that the claimant did not have disability beginning on February 17, 2000, and continuing through March 6, 2000, and find that the claimant did have disability for that time.

An employee is entitled to TIBs if the employee has a disability and has not attained maximum medical improvement. Section 408.101(a). There are, however, certain instances in which an injured employee who has disability will not be entitled to payment of TIBs. One such instance is set forth in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h)), which states:

A carrier may suspend [TIBs] if an employee fails to attend an RME [required medical examination], including a designated doctor examination, without good cause.

- (1) In the absence of a finding by the Commission to the contrary, a carrier may presume that the employee did not have good cause to fail to attend the examination if:
  - (A) by the day the examination was originally scheduled to occur the employee has both:
    - (i) failed to submit to the examination; and
    - (ii) failed to reschedule the examination to occur no later than the later of the seventh day after the originally scheduled examination date or the doctor's first available appointment date; or

- (B) after rescheduling the examination as provided in subsection (h)(1)(A)(ii) of this section, the employee failed to submit to the rescheduled examination.
- (2) If, after the carrier suspends TIBs pursuant to this section, the employee submits to the [RME], the carrier shall reinstate [TIBs] as of the date the employee submitted to the examination.
- (3) An employee is not entitled to TIBs for a period during which the carrier suspended benefits pursuant to this section unless the employee later submits to the examination and the Commission finds or the carrier determines that the employee had good cause to fail to attend the appointment.

Although not stated in the hearing officer's decision, it appears from the evidence presented that this provision of the rules was actually litigated by the parties, at least to some extent, and was the basis of the hearing officer's decision that the claimant did not have disability from February 17, 2000, through March 6, 2000. Although the hearing officer made mention that the claimant did not provide a believable explanation for his failure to appear for the required medical examination, the hearing officer made no other findings which would allow us to resolve the issue of whether the carrier was entitled to suspend TIBs under Rule 126.6(h) and whether the claimant had lost entitlement to TIBs for the period of suspension pursuant to Rule 126.6(h)(3).

The hearing officer found that the claimant did not have disability after July 13, 2000. While it is possible that the hearing officer could find that the claimant's disability ended on July 13, 2000, the hearing officer does not have jurisdiction over prospective or unaccrued income benefits. Thus, we have held that the hearing officer only has jurisdiction to determine disability up to the date of the CCH. Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993. Thus, the hearing officer's order exceeded her jurisdiction in determining that the claimant had no disability after July 13, 2000, the date of the hearing, and the hearing officer's finding that the claimant did not have disability after July 13, 2000, is reversed.

Because the hearing officer's determination that the claimant did not have disability from February 17, 2000, through March 6, 2000, is against the great weight and preponderance of the evidence and the hearing officer had no jurisdiction to enter an order that the claimant did not have disability after July 13, 2000, we reverse Conclusion of Law No. 4 and find that the claimant had disability resulting from the compensable injury of \_\_\_\_\_, beginning on November 12, 1999, and continuing through July 13, 2000.

Because of the issues of whether the carrier was entitled to suspend the payment of [TIBs] because of the claimant's failure to attend the RME and whether the claimant is entitled to [TIBs] for the period from the date of the RME until the date the claimant

submitted to the examination were actually litigated by the parties, this case is remanded to the hearing officer. On remand, the hearing officer is instructed to add the following issues:

1. Did the carrier properly suspend [TIBs] due to the claimant's failure to attend the February 16, 2000, appointment, and, if so, for what period?
2. Is the claimant entitled to [TIBs] for the period [TIBs] were suspended because the claimant had good cause for failing to attend the February 16, 2000, appointment and later submitted to the examination?

and to make appropriate findings of fact and conclusions of law.

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 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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Kenneth A. Huchton  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Robert W. Potts  
Appeals Judge