APPEAL NO. 002105

Following a contested case hearing held on August 17, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) had intermittent periods of disability on certain specified days in January, February, March, April, and May 2000, when she was away from her job for medical treatment, and that her income benefits began to accrue on February 7, 2000. The appellant (self-insured) has appealed, apparently contending that because the claimant never lost more than four hours for these absences in any one day during the five-month period, she has not incurred one day of disability, as "day" is defined in the Texas Administrative Code, Title 28, Part 4, Section 251.304 (SORM [State Office of Risk Management] Rule 251.304), and thus that income benefits under the 1989 Act have not accrued. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that at all times pertinent to this case the claimant was employed by the (employer); that the employer is a statutory self-insured with claims handled through the SORM; that the date of injury is _____ (all dates are in 2000 unless otherwise specified); that the claimant lost 83 hours of work from January 21 through May 31; and that the claimant took leave without pay for 83 hours during that period.

The claimant testified that on _____ she injured her back at work while performing filing duties; that she thereafter commenced chiropractic treatment with Dr. C; that she elected not to use sick leave to cover her absences from work for treatment by Dr. C, knowing she would be charged with leave without pay, because she wanted to accumulate sick leave; that when she realized she was losing a significant amount of her wages, she tried to arrange her medical appointments during her lunch periods; that she was seeing Dr. C daily at first and that her treatments later tapered off in frequency; and that her treatment with Dr. C concluded on May 31.

In evidence is a form entitled Employee's Election Regarding Utilization of Sick and Annual Leave (SORM-80), signed by the claimant on January 28, stating that when she loses time from work due to the _____ injury, she elects not to use any accrued sick leave and/or annual leave, and that she understands she will not receive workers' compensation payments until after the seven-calendar-day waiting period.

Dr. C's records reflect a diagnosis of lumbar disc syndrome, lumbar sprain/strain, and myofasciitis. Dr. C also issued a return-to-work slip dated January 27 specifying light duty and no prolonged standing nor lifting of more than 20 pounds.

The self-insured disputes the following factual finding and legal conclusions.

FINDING OF FACT

3. Due to the claimed injury, Claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage on the following dates in the year 2000:

January	27, 28 and 31;
February	1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 22, 23, 24, 25, and 28;
March	1, 3, 6, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, and 31;
April	3, 4, 5, 10, 11, 12, 13, 18, 19, 20, 21,24, 25, and 27; and
May	1, 2, 5, and 11.

CONCLUSIONS OF LAW

3. Claimant sustained disability on _____ and disability continued on the following dates in the year 2000:

   [Same dates as in Finding of Fact No. 3.]

4. Claimant's income benefits began to accrue on February 7, 2000.

The self-insured noted that 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 and that 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 injury. The self-insured does not take specific issue with any of the dates determined by the hearing officer including the date calculated as the accrual date. We do note that Finding of Fact No. 3 omits the date of _____ which is stated in Conclusion of Law No. 3.

The self-insured contended below that because the 1989 Act does not contain a definition of "day," or "week" for that matter, Rule 251.304 is implicated. The record was not favored with a copy of SORM Rule 251.304 nor was official notice thereof sought by the self-insured. The self-insured's representative averred below and states in its request for review that SORM Rule 251.304 provides that "[s]ick leave of four hours or more, but less than eight, will be counted as one day's sick leave for compensation purposes." The self-insured contends that the hearing officer disregarded this rule on the basis that it only pertains to sick leave and not to leave without pay and that T.A.C. Title 28, § 251.403 provides that "[a]ny adopted rule will be interpreted by the director [of SORM] so as to reflect the intent of the rule when applied to state agencies and employees." The self-insured further states the following: "The Workers' Compensation Act does not define one

day of leave for the purpose of compensation. SORM has attempted to define one day of leave as when an employee is absent from the work place for more than four, but less than eight hours due to a compensable injury. This is the reasoning SORM has been applying absent direction from TWCC." The self-insured is apparently contending that because none of the claimant's absences for medical treatment were for four or more hours, she has not had a "day" of sick leave and thus has not met the requirements of Section 408.082(a) and (b).

We do not find merit in the contentions of the self-insured. In the first place, the evidence clearly establishes that the claimant did not charge her absences for medical treatment against her balance of paid sick leave so we fail to see the applicability of Rule 251.304. Further, the Appeals Panel has held that the definition of disability in the 1989 Act (Section 401.011(16)) is "sufficiently broad enough to encompass uncompensated time off from work due to visits to medical care providers for the compensable injury if these visits result in reducing wages below the preinjury wage" and noted that the Appeals Panel had already held that intermittent periods of disability are permitted under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 961441, decided September 11, 1996. In Appeal No. 961441, the Appeals Panel affirmed the determination of the hearing officer that from September 9, 1995, to April 16, 1996, the claimant had 65.75 hours of disability resulting from losing time from work for appointments with health care providers which were directly attributable to the compensable injury. This decision has been followed in Texas Workers' Compensation Commission Appeal No. 961644, decided October 3, 1996; Texas Workers' Compensation Commission Appeal No. 980589, decided May 8, 1998 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 990721, decided May 20, 1999 (Unpublished). *Compare* Texas Workers' Compensation Commission Appeal No. 961022, decided July 11, 1996.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCURRING OPINION:

I concur in the opinion in chief and would add that a State Office of Risk Management (SORM) rule purporting to construe the 1989 Act would be of academic interest only, as the legislature has conferred upon the Texas Workers' Compensation Commission (Commission) the sole authority to adopt rules implementing the 1989 Act. Section 402.061. The director of SORM is expressly subject to the rules, orders, and decisions of the Commission. Section 501.042.

_____

Susan M. Kelley
Appeals Judge