

APPEAL NO. 002599

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 October 18, 2000. With regard to the only issue before him, the hearing officer determined that the appellant (claimant) is not entitled to temporary income benefits (TIBs) while he was incarcerated from _____, through _____.

The claimant appeals, contending that he was "found not guilty of any crime" and that therefore he is entitled to TIBs during the time he was incarcerated because he was unable to work. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, citing Appeals Panel precedent and urging affirmance.

DECISION

Affirmed.

Although not listed in the hearing officer's decision, the parties stipulated on the record that the claimant sustained a compensable injury on _____. Medical evidence suggests that the claimant sustained herniated cervical discs at C3-4, C4-5, and C5-6, as well as other thoracic and lumbar spinal complaints. Although the record is not clear exactly when the claimant was incarcerated and whether the carrier paid any TIBs, the period at issue is _____, through _____. In evidence is a Judgment on Plea of Not Guilty to the Judge showing a bench trial of a class A misdemeanor assault charge on March 5, 1999, with a finding of "Not Guilty." The claimant's status between March 5, 1999, and _____, is not clear but the parties proceeded as if the claimant was incarcerated during the entire period at issue.

The claimant seeks to distinguish this case from other decisions where the Appeals Panel has held that TIBs were not due while the injured employee was incarcerated, on the basis that he was "wrongfully incarcerated" (found not guilty in a bench trial).

An employee is entitled to TIBs if the employee has a disability and has not attained maximum medical improvement. (Section 408.101(a)). Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment" at the preinjury wage. We have noted that this is an economic concept. Texas Workers' Compensation Commission Appeal No. 941689, decided February 1, 1995; Texas Workers' Compensation Commission Appeal No. 990917, decided June 14, 1999. The Appeals Panel has held that if an injured employee becomes incarcerated (correctly or not) the actual loss of wages is attributable to such incarceration which is the reason for the inability to obtain and retain employment rather than the compensable injury. Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993;

Texas Workers' Compensation Commission Appeal No. 950617, decided June 5, 1995. In Appeal No. 92674 we held, in part:

TIBs are to replace lost wages due to a compensable injury. In this case, actual loss of wages became directly attributable to the claimant's incarceration since he cannot earn wages while incarcerated. In our opinion, incarceration, and not the compensable injury, has become the reason for the claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage.

The facts of this case do not provide a basis to distinguish it from those found in Appeal No. 92674. In addition, the Appeals Panel does not choose to change its interpretation of disability relative to incarceration which it reached in that decision, and notes that the effect of incarceration on disability stated in Appeal No. 92674 has consistently been followed.

Upon review of the record submitted, we find no reversible error and we hold that the hearing officer correctly applied the law.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Kenneth A. Huchton
Appeals Judge