APPEAL NO. 020203
FILED MARCH 6, 2006

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 012204, decided October 29, 2001, where we remanded the case for the clarification of the name and address of the registered agent for service of process. That information was obtained from the appellant (self-insured), and the hearing officer confirmed during a brief telephonic hearing on January 2, 2002, that the information was provided to the respondent (claimant). The hearing officer then issued a decision and order which includes matters pertaining to the remand, but otherwise amounts to the reissuance of his previous decision and order. 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 August 16, 2001. The hearing officer decided the disputed issue of whether the claimant had disability resulting from an injury sustained on _____, and the periods of disability, favorably for the claimant. The self-insured appealed Findings of Fact Nos. 5, 6, and 7, and Conclusion of Law No. 4 as unsupported by the evidence. The self-insured also states that the hearing officer's determination regarding payment of temporary income benefits (TIBs) was in error. The claimant did not respond to the appeal of the decision on remand, although he had responded to the original appeal, urging affirmance.

DECISION

Reversed and rendered.

Section 401.011(16) provides that "disability" means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The burden is on the claimant to prove by a preponderance of the evidence that he had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993.

The claimant in this case sustained a compensable back injury on _____, as stipulated by the parties. There was no evidence that the claimant was ever taken off work by a doctor because of this injury. The claimant missed work intermittently over the ensuing years to attend doctor's appointments, to undergo treatments such as epidural steroid injections and an intradiscal electrical thermal therapy procedure, and to receive other medical care necessitated by his compensable injury. The claimant always took paid sick leave or used vacation time when he was absent from work for any of his appointments or for medical care. The claimant never received any TIBs as a result of his compensable injury. There was no evidence presented that the claimant ever received less than his weekly preinjury wage at any time between his injury and his retirement. The claimant voluntarily retired from his position as print shop manager on January 31, 2000. The claimant testified that he had planned to work until age 70 (another four years), but because of the pain from his injury, the medications he took, and the 100-mile round-trip each day to work, he made the decision to retire. The claimant has sought work since

retirement, but has been unable to obtain employment in any capacity.

At the CCH, the claimant's position was that he was entitled to disability from February 1, 2000, through September 28, 2000, the date of maximum medical improvement (MMI) certified by the designated doctor. The claimant cited Texas Workers' Compensation Commission Appeal No. 950753, decided June 23, 1995, for the principle that the beginning date of disability did not occur until the claimant was actually unable to work and earn his normal income, and that did not occur until February 1, 2000, when the claimant retired. The importance of this is that the claimant would be eligible for TIBs until he reaches MMI. The self-insured, citing Texas Workers' Compensation Commission Appeal No. 970672, decided May 30, 1997, took the position that even though the claimant received his normal compensation when he took intermittent days of sick leave and vacation as a result of his injury, days of disability were accruing for purposes of determining the claimant's statutory MMI date.

In a detailed analysis of the facts, the hearing officer determined that the claimant had disability for 101 days, as established by the evidence, between the date of the injury and the date of the retirement. The hearing officer determined that, "[i]n order to avoid the loss of wages, the claimant was forced[1] to utilize accrued sick leave and vacation benefits during the times he was absent from work as a result of the compensable injury." The hearing officer went on to determine that TIBs were due to the claimant for 95 of the 101 days, excluding only the six days which fell after November 7, 1999, the date which the hearing officer determined to be the statutory MMI date (the expiration of 104 weeks after the date income benefits begin to accrue, as provided by Section 401.011(30)(b)).[2]

We hold that the hearing officer erred in this case. He failed to apply our clear precedent set forth in Appeal No. 950753, *supra*, which we believe is directly on point:

> The evidence clearly shows that the claimant continued to hold her full

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[1] We do not find support in the record for the hearing officer's determination that the claimant was "forced" to utilize accrued sick leave and vacation benefits. The hearing officer may be alluding to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2 (Rule 129.2), which became effective on December 26, 1999, and which discusses the voluntary and involuntary election to use accrued sick leave and vacation benefits, and whether such benefits would be characterized as post-injury earnings to calculate lost wages and TIBs entitlement. Prior to promulgation of the rule, and for the bulk of the period in question here, there was no comparable provision. We cannot apply concepts in a rule that was not in effect at that time. In any event, the claimant did not testify that he was "forced" to use sick leave and vacation benefits while getting medical attention. The claimant's wife testified to the effect that the claimant's retirement benefits would have been reduced if he had not taken sick and vacation time, and that it was "to his advantage to work and make his twenty years using all of the sick days, all of the time off from the college and all his vacation days to help him get through that period."

[2] Not discussed anywhere in the record, or even alluded to in any way as being applicable to this case, is Chapter 504 of the 1989 Act.

time employment position during the period from September 1st 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 [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 Appeals Panel went on to conclude that the claimant in that case did not have disability for the periods when she took sick leave or vacation because there was never a time that she did not obtain and retain employment at wages equivalent to the preinjury wage. The Appeals Panel followed that decision in Texas Workers' Compensation Commission Appeal No. 961022, decided July 11, 1996, finding that the claimant therein did not have disability during a time period when she continued to work at full pay, although that pay included paid leave for doctor's appointments. *See also* Texas Workers' Compensation Commission Appeal No. 961441, decided September 11, 1996, where the Appeals Panel found disability to exist where the claimant was not paid for time away from work for doctor's visits or to undergo medical treatment.

We reverse the decision of the hearing officer that the claimant had disability on the dates set forth in the Decision and Order and render a new decision that the claimant did not have disability for any period as a result of the compensable injury.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

PRESIDENT
COLLEGE
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge