

APPEAL NO. 91122

A contested case hearing was held on December 2, 1991. He (hearing officer) determined that the appellant was not entitled to temporary income benefits after February 26, 1991 under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act). Appellant disagrees with several of the hearing officer's findings of fact and conclusions of law and urges that temporary income benefits be resumed effective September 17, 1991.

DECISION

Agreeing with the hearing officer's determination that the appellant failed to prove by a preponderance of the evidence that temporary income benefits are due after February 26, 1991, we affirm.

This case involved an unfortunate incident wherein the appellant was assaulted with a pistol during a robbery while he was working in the early morning hours at a "Store" convenience store. This occurred on _____ and he was subsequently referred to a psychiatrist, Dr. S for psychiatric assistance. In a report dated January 14, 1991, Dr. S stated it was his impression the appellant was suffering from "a mild to moderate Post-Traumatic Stress Disorder with a certain degree of Depression." He went on to state that this "seems to be a temporary reaction which should not be allowed to extend indefinitely" and recommended that the appellant work in a day time shift at least temporarily until he recovers from this reaction.

Dr. S saw the appellant on February 5th and 21st and noted the appellant appeared extremely anxious, depressed, tense and worried. Dr. S also prescribed medication. In the February 5, 1991 report Dr. S recommended that the appellant "find things that he could get interested in, and stay as active as possible, as the inactivity will contribute to his deterioration and depression" and indicated appellant's receptiveness to supportive psychotherapeutic approach. Dr. S stated the appellant may return to work but should avoid stressful situations particularly anything that might expose him to circumstances similar to the January 8 experience. In his February 21, 1991 report Dr. S indicates that the appellant should return to work as soon as possible, but avoid working the night shift. Dr. S reported that the appellant tried to get a day time shift at Store but none were available and hence he had not been able to go back to work. Dr. S noted the symptoms appeared to be abating except for appellant's worry about his family situation and financial matters.

Dr. S saw the appellant on February 26 and reported that the appellant continued to improve quite significantly and that he plans to return to work on Friday, March 8. Although stating he would have preferred that the appellant start working during the day at least at first, Dr. S stated it was worth trying for the appellant to return to work without limitation as requested by the appellant.

The next visit to Dr. S was on March 14, 1991 and the report of that date indicates the appellant expressed concern that his employer, Store, told him they did not have any work for him as yet and that his other attempts to find work had been futile. Dr. S stated that although the appellant appeared extremely depressed and anxious and the situation was getting complicated because of his problems, he considered the appellant had improved significantly.

There are no further medical records until a report of Dr. S dated August 14, 1991. In that report, Dr. S says that he found the appellant to be "extremely depressed and desperate" and that his "situation has not improved at all" Dr. S provided the appellant medication due to severe depression. Dr. S noted that "in spite of the appellant's emotional state, he is willing to work even at night in order to "same (sic) his family." A follow-up report dated August 28, 1991, indicates the appellant appeared extremely depressed and that the circumstances had been getting even worse (referring to his total financial ruin). Dr. S concluded the report stating that "we encourage (appellant) to continue to look for any kind of job, as in my opinion, the longer he stays idle, the more he is going to deteriorate," and with the observation that "I am afraid that he is very close to a complete emotional collapse."

A "physician's statement" on a Department of Human Resources form dated September 17, 1991 and signed by Dr. S indicates the appellant cannot work because of a mental disabling factor with a prognosis of "guarded" and to last "approx. over 6 months." It is apparent that this form was needed to get food stamps for the appellant. The appellant testified that he did not see Dr. S before he filed out this form but had left the form at Dr. S's office.

Dr. S saw the appellant on October 9, 1991 and stated the appellant continued to have manifestations of a "Post-Traumatic Stress Disorder." Dr. S observed the appellant had not been able to make some weekly or bi-weekly visits to the office because of different types of personal problems. The appellant indicated to Dr. S that he was still not able to gain employment and that Store had not given him the opportunity to work during the day even though they had signs in their store indicating positions are available.

In a report dated October 15, and following a benefit review conference wherein the appellant was denied benefits by the Texas Workers' Compensation Commission because, according to the appellant, Dr. S "had mentioned in my reports that he was ready to work," Dr. S explains his position as follows:

It is true that this patient has been willing to go to work since the very first day, and I always advise my patients in similar circumstances to return to the job as soon as possible in order to prevent psychological deterioration. I recommended that they give him an opportunity to work the day shift, as going back to the night shift would have been too traumatic for him. Apparently, they have not had an opening at Store, and they have not given him any opportunity to see if he could do the

job. The patient had not had the opportunity to prove himself, and although he had tried to find "any job," he has not been able to find one because of the circumstances in which he is, besides the shortage of employment.

Maybe this patient was capable and ready to go back to work when I started working with him, and I recommended and encouraged him to try, but at the present time, his condition has deteriorated and is significantly aggravated by the circumstances, and I do not believe that he can handle any type of stress or responsibility, but still, he would like to prove himself, which is an expression of his honesty. This session was longer than others, and patient was found to be in such a condition, that, in my opinion, hospitalization is indicated, but he refused because "he has business to take care of".

The last report from Dr. S admitted at the hearing dated November 12, 1991 found appellant to be expressly anxious and depressed. Dr. S stated that the "frustration of not having been able to prove whether he could work or not has contributed to his psychological deterioration and his anxiety level is more elevated, his depression deeper." The appellant's medications were increased.

The appellant testified concerning the robbery and being assaulted with a pistol during the early morning hours of _____. One or two days after the incident he went to a hospital emergency room and was subsequently referred to Dr. S. He testified that Dr. S told him he was going through trauma and would not be able to work for a while. He states he was having "bad dreams" and tried not to be alone. Regarding his February 26 visit to Dr. S, the appellant stated that he wanted to return to work and that Dr. S finally agreed but said not at night; that he couldn't recommend working at night.

The appellant further testified that he did not work after the February 26 appointment with Dr. S because when he went to Store, he was told "[t]here is no way you can work during the day, that's a manager's shift." The person he talked to was not his original manager, but he subsequently got hold of the district manager after repeated attempts to get someone to get him back to work. The district manager told him to go back to the Store and that they were going to put him on the schedule. He followed these instructions but his name was not on any schedule. He stated he tried for about three weeks or a month to get in touch with the manager and then stopped trying.

The appellant testified he stopped seeing Dr. S in March and did not see him until August when he again told Dr. S of all of his difficulties and unsuccessful attempts to go to work. With regard to the form from the Department of Human Resources, he stated he did not see Dr. S on that occasion but left the form at his office. The appellant stated that he had been to the workers' compensation office and they referred him to different places for help and assistance. He stated that Dr. S still says he needs a lot of help and that Dr. S hasn't seen any change in him and does not recommend that he go back to work.

During cross-examination, the appellant stated he had tried to find work elsewhere but had been unsuccessful. He acknowledged that he had indicated at the benefit review conference that he had not looked for work since being released by Dr. S because he did not want to lie about his condition. He explained that he did look for some work but that the reason for this was he "couldn't lie under the application where it says are you under a doctor's care." He claims he looked for work at "produce - at the market" and in trying to get deliveries with his truck. He said someone denied him a job because he filled out his medical status. He testified he tried again and again to get his job back at Store but they never put him on a schedule and never got in contact with him although they said they would. He initially stated he does not remember Mr. RR ever telling him he could go back to work at night, but later stated he had been told he could return to his old position but that it never happened, they never put him on a schedule and never contacted him. From March to August he states he did not have a job but sold "some produce, did a couple of deliveries here and there."

On this appeal, the appellant disagrees with the following findings of fact and conclusions of law:

"Finding 5.

That on February 26, 1991, Claimant was released by his doctor to return to work, including working during the night.

Finding 6.

That though Claimant's doctor has at times recommended that he not work at night, he has not stated that Claimant is not to work at night.

Finding 7.

That the Claimant desires to return to work and that the doctor continues to recommend that Claimant return to work.

Conclusion 3.

That the Claimant has not proved by a preponderance of the evidence that temporary income benefits are due after February 26, 1991.

Conclusion 4.

That claimant is not entitled to additional temporary income benefits under the Texas

Workers' Compensation Act.

Appellant seeks resumption of temporary income benefits from September 17, 1991 when Dr. S stated the claimant was unable to work due to his mental condition.

That a compensable injury occurred on _____, is not in dispute. Similarly, there is no evidence to indicate that maximum medical improvement (MMI) has been reached by the appellant. An employee who has disability and who has not attained MMI is entitled to temporary income benefits (TIBs). Article 8308-4.23(a) of the 1989 Act.

In this case, it was not disputed that the appellant initially qualified for temporary income benefits and, indeed, they were paid until February 26, 1991. Inasmuch as appellant only seeks on this appeal that we order resumption of TIBs from September 17, 1991, the question of whether the entitlement to TIBs stopped on February 26, 1991 is no longer in dispute. It must be concluded that the appellant does not assert on this appeal that disability continued to be present following the February 26, 1991 report of Dr. S which indicated the appellant could return to work without limitation, and that disability resumed only on September 17, 1991 when Dr. S signed the Department of Human Resources form. Since disability is not now the issue for the period February 26 to September 17, the matter of whether there was any bona fide offer of employment by the Employer or anyone else for this period need not be explored. We do note, however, there is no evidence in the record that the employer made any bona fide offer of employment or otherwise re-employed the appellant. Article 8308-4.23(f), 1989 Act; Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE ' 129.5; see *generally*, Texas Workers' Compensation Commission Appeal No. 91045 decided November 21, 1991).

Since there is no evidence to indicate MMI has ever been reached in this case, we look to the matter of disability as provided by Article 8308-1.01(16):

"Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

At the outset, we observe that a mental ailment occasioned in the course and scope of employment under conditions like those in the instant case is a compensable injury. Article 8308-4.02, 1989 Act; Travelers Insurance Co. v. Garcia, 417 S.W.2d 630 (Tex. Civ. App.-El Paso 1967, writ ref'd n.r.e.); Bailey v. American General Insurance Co., 279 S.W.2d 315 (Tex. 1955). This was the compensable injury sustained by the appellant causing his disability. If it was not this compensable injury that caused his inability to obtain and retain employment at wages equivalent to his preinjury wages, he would not come within the definition of disability and hence not be entitled to TIBs for any period.

Disability is not necessarily a continuing status only; that is, an employee may have disability initially, followed by a period of no disability, only to have disability recur. See *generally* Texas Workers' Compensation Commission Appeal No. 91053 decided December 5, 1991. The evidence offered in this case to prove that disability recurred on

September 17, 1991 was the Department of Human Resources form which was, admittedly, filled out to get food stamps and was not based on any concomitant examination or appointment between the appellant and Dr. S, notwithstanding that it contained the diagnosis of Post-Stress Disorder. The hearing officer apparently did not find this to be sufficient evidence for the appellant to meet his burden of proof to establish, by a preponderance of the evidence, that he was entitled to a resumption of TIBs. The hearing officer specifically found that Dr. S continued to recommend that appellant return to work. Dr. S did not testify at the hearing. As the 1989 Act provides, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 91042 decided November 27, 1991. And, as stated, the burden of proof of disability recurring on September 17, 1991 was on the appellant. See Texas Workers' Compensation Commission Appeal No. 91027 decided October 24, 1991.

Our comprehensive review of the record in this case discloses no basis for us to determine the findings and conclusions of the hearing officer's were so against the great weight and preponderance of the evidence to be clearly wrong or unjust. In Re King's Estate, 244 S.W.2d 66 (Tex. 1951); Texas Employers' Insurance v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied). Clearly, this case involves a very unfortunate and troublesome situation wherein the appellant has found his on-the-job injury subsequently exacerbated greatly by personal, marital and financial problems. This, in turn, has led to some emotional deterioration, according to a chronological reading of the reports of Dr. S. However, unless the on-the-job or compensable injury causes the inability to obtain and retain employment at wages equivalent to the preinjury wage (Article 8308-1.01(16)), then TIBs are not payable under the 1989 Act. The evidence and the position of the parties on this appeal support a determination that after February 26, 1991, the initial compensable injury was no longer the basis of any inability to obtain or retain employment at equivalent wages. While the evidence proffered to establish that the appellant's disability recurred on September 17, 1991 or sometime later (the Department of Human Resources form and the October and November reports of Dr. S) surely shows a deteriorating emotional state because of adverse personal and financial circumstances and the lack of permanent employment, it does not establish disability under the definition of that term in the 1989 Act. As found by the hearing officer, this evidence, considered in the context of the whole record, including the period between March and August when the appellant was not seeing Dr. S., was not contrary to the recurring opinion by Dr. S that the appellant could return to work. In sum, disability had not recurred because the compensable injury was not preventing the obtaining and retaining of employment at equivalent wages. The hearing officer concluded that the appellant had not sustained his burden of proof by a preponderance of evidence that TIBs were due after February 26, 1991. See generally Travelers Insurance Company v. Rodriguez, 453 S.W.2d 857 (Tex. Civ. App.-Eastland 1970, writ ref'd n.r.e.). Even if the appellant is seeking the reinstatement of TIBs back to February 26, there is probative evidence sufficient enough to support the hearing officer's finding that the appellant no longer had disability as of February 26, 1991.

As we do not find the findings and conclusions of the hearing officer to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, we affirm.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge