

ADVISORY NO. 76

TOPIC: INCARCERATION AND DISABILITY

The Appeals Panel has clarified the Commission's position regarding disability, and the carrier's obligation to pay temporary income benefits when the claimant is incarcerated because of criminal activities. In a decision recently released, the Appeals Panel considered whether a claimant's disability ceased because the claimant had voluntarily removed himself from the labor market through the activities resulting in his incarceration.

In Texas Workers' Compensation Appeal No. 92674 (Docket No. FW-91-055563-01-CC-FW42), the claimant sustained a compensable injury in the course and scope of employment. After the injury, claimant was arrested for a robbery that occurred prior to the injury. Claimant was subsequently incarcerated in State prison.

Carrier argued that disability had ceased because the claimant had voluntarily removed himself from the job market and, therefore, could not show that his inability to obtain and retain employment was as a result of a compensable injury. The Appeals Panel analyzed the difference between disability (as defined by the new law) and loss of wage earning capacity (as defined by decisional authorities under the old law). The Panel considered the two concepts to be distinct.

Reasoning that the payment of temporary income benefits are designed to replace lost wages, the Panel distinguished out of state authority permitting the payment of benefits in jurisdictions where payment of benefits was based on a loss of wage earning capacity. The Panel clearly holds that a claimant's incarceration results in a complete inability to obtain and retain employment at wages equivalent to pre-injury wage. It states that "actual loss of wages (becomes) directly attributable to the claimant's incarceration since he cannot earn wages while incarcerated".

A previous Appeals Panel decision (No. 92428) was distinguished on the basis of the evidence presented. We believe the most recent decision to be the position which should be followed by our clients.

A question remains whether suspension should be performed unilaterally. The most recent decision (No. 92674) does not address the issue. The Appeals Panel has expressed its displeasure with the unilateral suspension of temporary income benefits based on disability issues. See, Texas Workers' Compensation Appeal Nos. 91060 and 92049. We recommend that any case involving this issue be scheduled for a benefit review conference to obtain an Interlocutory Order permitting suspension. By the time of the benefit review conference, evidence establishing the incarceration should be available to provide to the Commission. If an agreement with the claimant can be obtained, that he has no further disability, the benefit review conference can be avoided.

We recommend that you closely review Appeals Panel decision 92674. Further, if you have cases which may be controlled by the decision and you wish to discuss them, please contact our office.

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