APPEAL NO. 040006
FILED FEBRUARY 9, 2004

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 December 11, 2003. The hearing officer determined that the respondent (carrier) waived the right to contest the compensability of the appellant's (claimant) injury; that the _____, compensable injury extends to and includes an umbilical hernia; and that the claimant has not had any disability resulting from the _____, compensable injury. The hearing officer's determinations on carrier waiver and extent of injury have not been appealed and have become final pursuant to Section 410.169.

The claimant appeals the disability determination, contending that he continues to be under restrictions from his doctor, and that his employer has failed to accommodate his restrictions. The claimant asserts that the hearing officer applied the wrong standard in reaching his disability determination. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant, a millwright, sustained a compensable injury on _____, while lifting a barrel. The claimant saw a doctor about a week later, and an umbilical hernia was suspected. This diagnosis was later confirmed, and the hernia has been found to be compensable in the hearing officer's unappealed determination. The claimant was given a full-duty release, and a note from his doctor indicates that there is a possibility that the hernia will need to be repaired in the future. The claimant testified that he continued to work for the employer without missing any time, due to his compensable injury, until December 5, 2001, when he resigned to start his own business. The claimant further testified that he returned to work for the employer in April of 2003, due to the failure of his business. On April 11, 2003, a preemployment physical examination was performed. The claimant's umbilical hernia is noted, and the claimant was restricted from lifting over 60 pounds with no pushing or pulling. The claimant testified that his employer sent him out on a job that lasted six weeks. The job ended on June 6, 2003. The claimant testified that a few days after the completion of that job, his employer contacted him regarding another job. The claimant testified that he went to the doctor's office to do a drug screen and he was told that he would not be allowed to work until he had his hernia repaired per the doctor's orders. The claimant testified that the superintendent at the new job site informed the employer that the work the claimant would be doing involved lifting, pushing, and pulling. The claimant testified that he has tried to find employment, but that nobody will hire him with a hernia and his employer hasn't called him back with other work. A medical record dated July 28, 2003, appears to take the claimant off work until the hernia is repaired. The record reflects that the claimant sought approval for the hernia repair on August 15,

2003, but that the carrier denied the surgery contending that it was not medically necessary.

Disability is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). In determining that the claimant did not have disability, the hearing officer stated:

> Claimant's history of working for more than two years with the hernia is some indication that it does not interfere with his ability to make his wages. The lack of proof of a worsening condition is another element. Finally, I did not find [c]laimant's testimony about the reason for his unemployment to be convincing. He provided inadequate evidence that his chosen profession generally requires heavy lifting, and showed that he has earned his living in several different businesses over the years.

Based upon the evidence presented in this case, we are concerned that the hearing officer applied the wrong standard in reaching his disability determination. We have often held that a claimant can move in and out of disability. *See* Texas Workers' Compensation Commission Appeal No. 031317, decided June 25, 2003. The claimant's uncontroverted testimony was that his employer attempted to send him out on a job, and that he was not permitted to perform that job because of the restrictions due to the compensable injury. There is no evidence that the employer issued a restricted duty job offer to the claimant after that event occurred, or that a bona fide offer of employment was tendered. If the claimant's testimony is believed, then the claimant, by definition, had some period of disability. Whether or not the job required heavy lifting is not important. What is important is whether or not the claimant was not allowed to perform the job because of the existence of the restrictions due to his compensable injury. It is likewise not dispositive to the issue of disability that the claimant had been able to work for two years after sustaining his compensable injury, or that his condition had not worsened. When determining whether a claimant has disability, the focus is whether because of a compensable injury there is an inability to obtain and retain employment at the preinjury wage at the time of the claimed period of disability, not at some prior time.

Because we are uncertain of what the hearing officer's rationale for denying disability is, we must remand the case back to the hearing officer for additional determinations on the issue of disability. On remand, if the hearing officer still determines that the claimant did not have disability, he is directed to set out his rationale and make the appropriate findings of fact consistent with his opinion. If the hearing officer determines that the claimant did have some period of disability, the hearing officer is directed to make a determination of what that period is.

Pending resolution of the remand concerning disability, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from

such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ARGONAUT SOUTHWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JOSEPH A. YURKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge