

APPEAL NO. 052804
FILED JANUARY 23, 2006

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 28, 2005. With regard to the only issue before her the hearing officer determined that the appellant (claimant) did not sustain disability from October 25 through December 31, 2004.

The claimant appealed, contending that the evidence proved that he had disability as provided by the 1989 Act. The file does not contain a response from the respondent (carrier).

DECISION

Reversed and a new decision rendered.

It is undisputed that the claimant was employed as a heavy equipment operator and that he sustained a compensable injury to his head and right upper extremity on _____. The claimant testified that he was taken to a clinic and was seen by a doctor the same day and that his right arm was placed in a cast. A Work Status Report (TWCC-73) dated October 25, 2004, notes an elbow/forearm fracture, other right extremity injuries and a concussion and restricts the claimant from all work from October 22 through November 22, 2004. The claimant testified, and documentary evidence supports, that the claimant did, in fact, return to light duty on October 25, 2004, working reduced hours. The claimant testified that the first week after his return to work he rode around with his supervisor working his pre-injury hours and thereafter he performed various office duties such as copying and answering the telephone at reduced hours. The medical records establish that the claimant had right elbow surgery under general anesthesia on November 11, 2004. It appears undisputed that the claimant worked an average of 54.8 hours per week with an average weekly wage (AWW) of \$709.77 prior to his injury and that after his injury he was working 34.5 hours per week with average post injury earnings of \$402.33 a week.

There was evidence that coworkers and others in the claimant's crew worked an average of 34.5 hours per week during the period at issue. The carrier attributed the difference between the hours the claimant worked pre and post injury to the fact that others working in the claimant's crew or on the job site, were precluded from working more hours a week during the time at issue due to inclement weather and holidays.

In determining the claimant did not have disability the hearing officer accepted the argument that the "Claimant would have worked the same number of hours as those crew members had he not been injured, and that Claimant therefore would have worked a reduced number of hours during the interval in question [October 25 through December 31, 2004] even if he had not sustained an injury." The hearing officer

commented that the disability must be casually linked to the compensable injury and that the claimant “would have earned a reduced wage, regardless of his injury” and the reduced AWW “was merely coincidental.” We hold that determination to be in error. Disability is not based on what the claimant’s duties would have been if he had not been injured, rather disability is based on his ability to earn his preinjury wage.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. During the period of October 25 through December 31, 2004, the claimant either earned less than his preinjury wage or was unable to do any work at all due to surgery. The hearing officer finds that this reduction in earnings “was not the result” of the compensable injury (“injury for which workers’ compensation benefits are payable”) but rather due to inclement weather, holidays or other reasons. The fact is that the claimant had a compensable right arm injury (among other things), that his arm was in a cast and during all or most of the time at issue. Even the hearing officer concedes that the claimant was “unable to return to his preinjury job duties” and that a doctor had the claimant off work entirely for a portion of the time. Nonetheless because other workers in the claimant’s crew, and on the job site, worked reduced hours due to weather etc., those reduced hours are attributed to the claimant. A fallacy of this argument is illustrated by the fact that on November 11, 2004, the claimant was undergoing right elbow surgery under general anesthesia due to the compensable injury and therefore clearly had disability, as defined by the 1989 Act, because he clearly had no ability to work regardless of the weather conditions or how many hours others did or did not work. The argument that other similar workers also had reduced hours does not take into account that the claimant was unable to obtain and retain other, perhaps part time, employment to make up for any reduced hours due to inclement weather due to his compensable injuries. The carrier can, of course, consider the post-injury earnings the claimant earned in calculating TIBs, but the issue in this case is disability, not the amount of TIBs the claimant may receive.

We reverse the hearing officer’s decision that the claimant did not have disability from October 25 through December 31, 2004, and render a new decision that he did have disability from October 25 through December 31, 2004.

The true corporate name of the insurance carrier is **AMERICAN CONTRACTORS INSURANCE GROUP** and the name and address of its registered agent for service of process is

**R. BRAD PORTER
12222 MERIT DRIVE, SUITE 1600
DALLAS, TEXAS 75251.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge