

APPEAL NO. 080480
FILED JUNE 2, 2008

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 March 5, 2008. The hearing officer resolved the disputed issues by deciding that on _____, the appellant (claimant) sustained a compensable injury and that the claimant had disability beginning November 3, 2006, and continuing through November 15, 2006, and beginning December 29, 2006, and continuing through February 13, 2007, and at no other time. The claimant appealed, arguing that she had disability continuously from November 3, 2006, through February 13, 2007. The claimant argues that the hearing officer erred when she placed the burden on the claimant to establish he could not work light duty. The respondent (carrier) responded, urging affirmance of the disability determination. The hearing officer's determination that the claimant sustained a compensable injury on _____, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The determination that the claimant sustained a compensable injury on _____, has become final. The evidence reflects that the claimant sustained his compensable injury when he fell on his left hand and that he underwent surgery to his left hand on November 3, 2006, to repair a spiral fracture to the base of the second and third metacarpals. The claimant was released to return to work with restrictions on the use of his left hand on November 16, 2006, by his treating doctor, and was completely taken off work by his treating doctor on December 28, 2006, due to his left hand injury, which had swollen. The claimant underwent a functional capacity evaluation (FCE) on January 30, 2007, which concluded that the claimant was not able to return to work full duty performing his preinjury job. The FCE noted that the claimant's job installing air conditioners involved heavy work and that he was not able to meet his lifting job demands due to the pain in his left hand. The claimant's treating doctor released him to return to work full duty on February 13, 2007. The claimant testified that he was terminated from his job on or about November 6, 2006.

The hearing officer in her discussion of the evidence stated that the "[c]laimant's treating physician placed [him] on light duty from November 16, 2006 until December 28, 2006. The evidence established that [c]laimant did not work during this time period. However, no evidence established that [c]laimant could not work light duty during this time."

The claimant had the burden to prove he had disability as defined by Section 401.011(16). Appeals Panel Decision (APD) 032579, decided November 19, 2003. The fact that a claimant is released for light duty is evidence that the effects of the injury

continue and disability exists; even a claimant terminated for cause may establish disability thereafter. APD 032767, decided December 9, 2003. A claimant need not prove that the compensable injury was the sole cause, as opposed to a cause, of the disability. APD 022689, decided November 25, 2002. The 1989 Act does not impose on an injured employee attempting to establish disability the requirement to seek employment while still suffering from the lingering effects of his injury unless such employment is readily available and fully compatible with his physical condition and generally within the parameters of his training, experience, and qualifications. APD 91045, decided November 21, 1991. In APD 941261, decided November 2, 1994, the Appeals Panel held that when seeking to establish disability “an employee under a conditional medical release [does] not have to show that work was not available.” See *also* APD 020352, decided April 3, 2002.

The hearing officer applied an incorrect standard in resolving the disability issue. The evidence reflects that the claimant did not work during the time period from November 3, 2006, through February 13, 2007, because of the compensable injury. The only medical evidence in the record for the disputed time period on appeal, November 16, 2006, through December 28, 2006, for which the hearing officer found no disability, is that the claimant was released to work with restrictions on the use of his left hand for this time period. The hearing officer’s decision that the claimant did not have disability from November 16, 2006, through December 28, 2006, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we reverse the disability determination and render a new decision that the claimant had disability from November 3, 2006, through February 13, 2007.

The true corporate name of the insurance carrier is **LUMBERMEN'S UNDERWRITING ALLIANCE** and the name and address of its registered agent for service of process is

**DEBRA S. MATHEWS-BUDET
12200 FORD ROAD, SUITE 344
DALLAS, TEXAS 75234.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge