APPEAL NO. 931134

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.), (hearing officer) presided over a contested case hearing in (city), Texas, on August 17, 1993, and September 28, 1993, with the record being finally closed on November 12, 1993. She determined that the respondent (claimant) sustained a compensable injury to her left leg and lumbar spine on (date of injury), and had disability from (date), through December 6, 1992. The appellant (carrier) appeals urging error in the hearing officer's finding that the claimant was unable to obtain and retain employment because of a work-related injury and in concluding that the claimant had disability as a result of a compensable injury. The carrier also urges error by the hearing officer in not allowing the carrier to present evidence of sole cause. The claimant responds, in essence, that the decision should be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The issues at the hearing were whether the claimant had a compensable injury on (date of injury), and whether the claimant had disability from the (date of injury) injury. Regarding the injury, the claimant testified that on (date of injury) she slipped on the steps of the bus she was operating and that she fell hurting her leg and back. Later the same day she reported the matter to a supervisor and was subsequently taken to a hospital. She underwent regular therapy over the ensuing weeks and medical records document the claimed fall and treatment. Her family doctor treated her for the back and leg condition and a work release in evidence from her doctor states that she was unable to work from "(date)" to "12/6/92" and lists left knee and hip injury and lumbar strain. Clearly, this is sufficient evidence from which the hearing officer could find that the claimant sustained a compensable injury on (date of injury). Only were we to find, which we do not, that such finding was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be any sound basis to disturb the finding. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The carrier's position was that even if the claimant sustained a compensable injury to her back and leg on (date of injury), it was not the basis or producing cause of any subsequent disability, as that term is defined in the 1989 Act. Section 401.011(16). The carrier introduced a case record from the "Employee Assistance Program" (EAP) where the claimant had apparently been referred or agreed to go in August 1992. (A notation in the record indicated that the claimant came to EAP two years ago but did not pursue any program). Succinctly, this lengthy record contained numerous daily entries by a case worker between the period "8-19-92" and "5-26-93" referring to possible psychiatric problems. A notation dated "9-2-92" indicated that (Dr. S), a psychiatrist, had

recommended that the claimant be hospitalized for depression, paranoia, and psychosis. The claimant apparently decided to continue working since she sustained the back and leg injury on (date of injury) which was recorded in the EAP record regarding her treatment. The EAP record also shows that the claimant was under treatment for her psychiatric related condition, including some hospitalization, during the period covered by the record although there was apparent disagreement between the claimant, EAP, and the doctor regarding her treatment. The EAP record also indicates that EAP would be the one to let the employer know when the claimant could return to work and that the claimant was told she could not return to work without a release. There was no record or report in evidence from a doctor that took the claimant off of work or returned her to work for a psychiatric condition although record entries indicate that claimant was advised she could not return to work without a release from EAP. In any event, the claimant had not returned to work from the time of the accident on (date of injury).

Carrier urges that the claimant's psychiatric condition was the reason the claimant could not work and the basis for any disability (at least at some time during the period between (date of injury) and December 7th) rather than the leg and back injury resulting from the slip at work. The carrier urges that the situation is "analogous to incarceration" and that the Appeals Panel has held if an injured employee becomes incarcerated that the actual loss of wages becomes directly attributable to such incarceration and is the reason for the inability to obtain and retain employment at wages equivalent to the preinjury wage. *See* Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993. In situations involving incarceration, the worker is totally withdrawn from the labor market while incarcerated. We have "declined to expand our ruling regarding unavailability for employment due to incarceration to circumstances affecting injured workers who are not imprisoned." Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993: a case where an injured worker was diagnosed with infectious hepatitis B sometime after sustaining a compensable cervical injury which resulted in disability. Quite apart from any psychiatric condition, the hearing officer determined that the leg and back injury was a producing cause of the claimant's disability from (date) through December 6th. The evidence, including the medical records and the specific "Disability Certificate" dated "11-13-92" from the claimant's treating doctor (for her back and leg injury), was sufficient to support the hearing officer. It is not necessary that the injury in issue be the only cause of disability to warrant income benefits. To the contrary, a carrier would be absolved of liability for income benefits only if the another injury or condition was the sole cause of the disability. *See* INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ); Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994; Texas Workers' Compensation Commission Appeal No. 93839, decided October 29, 1993; Texas Workers' Compensation Commission Appeal No. 93697, decided September 23, 1993. A claimant has the burden to prove disability resulting from the claimed injury but need not prove that the claimed injury was the sole cause, as opposed to a cause, of the disability. Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No.

92322, decided August 14, 1992. The burden is on the carrier to show that a pre-existing or subsequent injury or condition is the sole cause of the disability to be relieved of liability. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. Here, the hearing officer determined, with sufficient evidence to support her, that the (date of injury) injury was a producing cause of her disability.

During the course of the hearing, the hearing officer sustained an objection to the evidence offered by the carrier concerning the psychiatric condition of the claimant on the basis that such evidence went to a sole cause issue which was not an issue before her. We find that the hearing officer incorrectly sustained the objection since the claimant had established a prima facia case that the (date of injury) injury was at least a producing cause of the disability for the period in question. Clearly, the carrier is entitled to present evidence to counter or defend against this presentation by the claimant and is not prohibited from attacking the claimant's prima facia case. Appeal No. 93839, *supra*. *See generally* Texas Workers' Compensation Commission Appeal No. 93397, July 5, 1993. However, after the hearing and before closing the record, the hearing officer reversed herself and admitted and considered this evidence. After considering this carrier-offered evidence, the hearing officer determined that the (date of injury) incident was a proximate cause of the claimant's disability for the time period in question. As we have stated, there is sufficient evidence to support that determination. We assume from her actions that the hearing officer reassessed her view on not permitting evidence related to sole cause because it was not specifically raised as a distinct issue. And, there is nothing to indicate that the carrier had any further evidence it desired to present on this matter; there was no offer of proof, bill of exceptions or other showing on the matter. In any event, we conclude that the hearing officer's stated notion on the evidentiary limitations was harmless error, under the circumstances, and any error would not have altered the results or caused the rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 93749, decided October 6, 1993. *See also* Texas Workers' Compensation Commission Appeal 93422, decided July 12, 1993, and Texas Workers' Compensation Appeal No. 93437, decided July 16, 1993, where evidence was presented concerning sole cause although not a specific issue and where the issue was disability.

For the forgoing reasons, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge