APPEAL NO. 94211

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 6, 1993. The issues at the hearing were whether the respondent (claimant) is entitled to impairment income benefits (IIBS) and whether the claimant had disability from May 24, 1993, to September 3, 1993, as a result of a compensable injury sustained on (date of injury). The hearing officer found for the claimant on both issues. The appellant (carrier) contended at the hearing and now on appeal that the claimant was not entitled to benefits under the 1989 Act because her status as an undocumented alien prohibits her from being able to legally work in the United States. The claimant has submitted no response to this appeal.

DECISION

We affirm in part and reverse and render in part the decision and order of the hearing officer.

It is undisputed that the claimant suffered a slip and fall accident on (date of injury), in the course and scope of her employment as a motel cleaning person with resulting lumbosacral sprain/strain, nerve root compression, cervical myofascitis and cervicobrachial syndrome. She continued to work without lost time except for doctor's appointments until May 24, 1993, when her treating doctor, Dr. K, D.C., excused her from work because of the pain she was experiencing in her back. According to her testimony, Dr. K released the claimant to return to work as of September 3, 1993. Dr. K also determined that the claimant's date of maximum medical improvement (MMI) was September 3, 1993, and assigned a four percent impairment rating (IR). Neither of these latter determinations were made issues at the hearing.

The claimant testified through an interpreter that she has lived in the United States for seven years and during this time has never had an entrance visa or work permit. She admitted that she knowingly used another person's social security number to get the employment she had when she was injured. In a letter of June 24, 1993, apparently unrelated to the claimant's claim for benefits under the 1989 Act, the claimant's employer advised her that as a result of an identification verification process, she was asked to contact both the local social security office and immigration office. She was told that the employer needed a valid authorization to work by July 2, 1993, and until then "you will be unable to work." The claimant has not worked since May 24, 1993. She testified that she did not return to work after her doctor's release "because I don't have my legal documents." In addition the following colloquy took place at the hearing:

Q. Do you think you could work if you had a job to do?

A. I think I could but the pain that I have is constant. It never goes away. When I clean my house, it's enough to bring the pain on and keep it nagging at me.

Q. If you had a job to do between 5/24 and 9/3, could you physically have done that job?

A. With great pains.

Q. Did the doctor tell you to stay off work from May the 24th till [sic] September the 3rd of '93?

A. From the 24th of May through September, yes. I was receiving therapy at that time.

The claimant further testified that she has not seen Dr. K since he released her to return to work and that she has not looked for work since then and will not look for work until "all my papers are legal." When asked again if she could work, she replied:

> Possibly yes, I can, but not in a work as heavy as what I was doing because I have found out that bending over continuously like I did affects your back quite a bit.

Based on this evidence and the arguments of the parties, the hearing officer, in his statement of the evidence, stated that Section 406.092(a) of the 1989 Act contemplated "that illegal aliens might be injured while working in Texas, and specifically provides that such aliens are entitled to benefits under this Act."[1] He further concluded that the claimant was entitled to IIBS and that she had disability from May 24, 1993, until September 3, 1993. We agree that under Section 406.092(a) an employee's status as an alien whose entry into the United States may have been contrary to immigration laws does not in itself preclude the receipt of benefits under the 1989 Act that the alien otherwise qualifies for. This is consistent with prior Texas workers' compensation law, *see* Commercial Standard Fire and Marine Company v. Galindo, 484 S.W.2d 635 (Tex. Civ. App.-El Paso 1972, writ ref'd n.r.e.). *See also* 1A LARSON, WORKMEN'S COMPENSATION LAW § 35.20, for the general proposition that ". . . illegal entry into this country does not deprive an alien of compensation rights."

The dispute in this case is essentially whether the claimant's conceded status as an undocumented alien without legal right to work in the United States precludes her from having disability as defined under the 1989 Act. And although the carrier maintains on appeal that the hearing officer erred in awarding IIBS, Section 408.121(a) conditions IIBS on the attainment of MMI and the assignment of an IR, not on the existence of disability. Since MMI and IR have not been challenged in this case, we hold that under the facts of this case, the hearing officer did not err in awarding IIBS.

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[1]Section 406.092(a) provides: "A resident or nonresident alien employee or legal beneficiary is entitled to compensation under this subtitle." No distinction is made based on legal or illegal entry status.

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." (Emphasis added.) The claimant has the burden of proving by a preponderance of the evidence that she has disability for a specific period or periods of time. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. We have also held that a claimant need not prove that the injury was the sole cause, as opposed to a cause, of the disability. A carrier who desires to show that some other condition was the sole cause of the disability has the burden of proof. Texas Workers' Compensation Commission Appeal No. 931134, decided January 28, 1994. Whether disability exists is a question of fact for the hearing officer to decide. The Appeals Panel will not reverse a factual finding of a hearing officer unless it is against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

It is undisputed that the employer terminated the claimant's employment effective June 24, 1993, because the claimant did not (and the claimant admitted she could not up to the time of the hearing) produce evidence of legal permission to work in the United States. The claimant also testified that she could work, although in pain and if not doing precisely the same job she held prior to her injury. We have held that pain may be evidence of disability, but pain in itself is not compensable. *See* Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. Despite this testimony and evidence the hearing officer stated in his statement of the evidence that the "claimant testified she was unable to work from May 24, 1993, to September 3, 1993 . . . as a result of her injuries."

The carrier urges that we analogize this situation to the incarceration cases in which we have generally held that an incarcerated worker is withdrawn from the labor market and therefore cannot normally have disability because his or her inability to obtain or retain work is the result not of a compensable injury but of confinement in a penal institution. *See* Appeal No. 931134, *supra*; Texas Workers' Compensation Commission Appeal No. 93352, decided June 28, 1993; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993; and Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992.

While there may be merit in carrier's analogy to the extent that lack of a work permit has the effect of removing a claimant from the labor market, this condition is obviously not a physical impediment of the kind that derives from incarceration. It is solely a legal barrier, independent of the effects of an injury, which is arguably as compelling as that of incarceration. However, we need not in this case address the question whether lack of a work permit as a matter of law becomes the reason why an otherwise injured employee is unable to obtain and retain employment. The overwhelming weight of the evidence, including the claimant's own testimony, compels the conclusion that she did not seek work after June 24, 1993, solely because she did not have the correct documentation, not because she was unable to work due to her injury. The hearing officer, in focusing on the question of alien rights under the 1989 Act, ignored the impact of the employer's June 24,

1993, letter and the claimant's testimony on the reasons why she did not seek work, at least after this date. While Dr. K's work excuse for this period is some evidence that the claimant could not work, we believe it insufficient, in the face of the other evidence, including claimant's own testimony that she would have been able to do some types of work, to support a finding of disability from June 24, 1993, until September 3, 1993.

The evidence of why the claimant did not work from May 24, 1993, until June 23, 1993, is more problematic. She testified that she went to Dr. K at this time because her pain was becoming more severe. He excused her from work on this date because of her injury. The employer at this time was apparently not aware of the claimant's work status. Thus, we conclude that, from the evidence presented, her injury, not her alienage, was the cause of her not working and whether she was legally permitted to work or not for this period was, in fact, not the sole cause or even a producing or co-existing cause of her inability to work. Hence, we conclude she did have disability for the period from May 24 to June 23, 1993, as defined by the 1989 Act.

That part of the decision and order of the hearing officer that the claimant is entitled to IIBS is affirmed; that part of the decision and order of the hearing officer that the claimant had disability from May 24, 1993, to September 3, 1993, is reversed and a new decision is rendered that the claimant had disability only for the period from May 24, 1993, until June 23, 1993.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge