

## APPEAL NO. 971727

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 7, 1997. The issues at the CCH were whether a subsequent injury was the sole cause of the respondent's (claimant) current cervical or neck problems and whether the claimant had, and the periods of, disability. The hearing officer determined that the claimant's current cervical or neck problems are the result of his \_\_\_\_\_, compensable injury and are not the sole result of any intervening accident or injury, and that the claimant had disability from January 20, 1997, to February 10, 1997, and from April 15, 1997, continuing through the date of the hearing. The appellant (carrier) appeals, urging error on the part of the hearing officer in "amending" the first issue. Carrier further urges error in the hearing officer's findings that the current cervical or neck problems are the result of the \_\_\_\_\_, compensable injury and that the claimant had disability, arguing that those findings are against the great weight of the evidence. The claimant responds that the evidence is sufficient to support the determinations of the hearing officer.

### DECISION

Affirmed.

The issue reported out of the benefit review conference (BRC) in which the carrier urges error was committed in the amendment thereof which was: "[i]s the compensable injury a producing cause of the claimant's cervical or neck injury?" In response to the BRC report, the carrier requested the issue be reworded to state "is the compensable injury a producing cause of the claimant's current cervical or neck problems; and if so, is the claimant's current need for medical treatment a result of the compensable injury," and the claimant requested that an issue be added stated as "is the subsequent injury the sole cause of the present incapacity?" The hearing officer rejected both and over the objection of the carrier, amended the issue to read "is the subsequent injury the sole cause of the claimant's current cervical or neck problems?" The hearing officer then announced that the carrier had the burden of proof on the first issue. We agree that the hearing officer committed error in his amendment of the first issue. As the carrier argued, the hearing officer by his amendment changed the complexion of the case and improperly switched the burden of proof to the carrier without the claimant having the burden to prove that his current condition was related to his prior compensable injury.

In Texas Workers' Compensation Commission Appeal No. 961390, decided August 30, 1996, we stated:

As the Appeals Panel pointed out in Texas Workers' Compensation Commission Appeal No. 952061, decided January 22, 1996, sole cause can be an important consideration in defending against liability because a compensable injury need only be a producing cause, among others, of the current condition or of disability. Thus to defeat liability, a carrier can assert

that the sole cause is something other than the compensable injury. This is not to say that a carrier is limited to a sole cause defense when a claimant contends that the current effects or the current medical condition is the result of the injury. To the contrary, a claimant always has the burden of proving an entitlement to the relief sought.

We also indicated that the carrier could either rely on the claimant's inability to prove his case, or on a sole cause defense in which case it would then have the burden of proof. Once a claimant has made out a *prima facie* case that the current condition is a result of the original compensable injury, the burden to prove that a preexisting condition or unrelated injury was the sole cause of the current condition or problem falls on the carrier. See Texas Workers' Compensation Commission Appeal No. 971134, decided July 31, 1997.

While we find error in this case in the amendment made by the hearing officer, over the objection of the carrier, we test for prejudice to determine if corrective action is necessary. From our review of the record of the proceedings and the decision and order of the hearing officer, it is apparent to us that prejudicial error does not exist and that the case was actually resolved on the basis that the hearing officer found as fact from the evidence presented by the claimant that his current cervical or neck condition was a result of the compensable \_\_\_\_\_, injury. His findings and conclusions do not indicate that his decision was predicated upon the carrier failing to meet its burden of proof on the affirmative defense of sole cause. To the contrary, the case proceeded with the claimant testifying and presenting his evidence to show that the current cervical or neck condition was a result of the \_\_\_\_\_, compensable injury, the Decision and Order of the hearing officer discusses the evidence presented (including the medical opinion of the claimant's doctor) and makes findings of fact that go to the affirmative findings to support the ultimate conclusion that the current cervical or neck problems are the result of the \_\_\_\_\_, compensable injury. The decision does not suggest any reliance on a failure of the carrier to prove sole cause. Under these circumstances, and after our review of the total record and the decision, we conclude that the error was not prejudicial requiring corrective action. Texas Workers' Compensation Commission Appeal No. 950190, decided March 21, 1995.

Regarding the sufficiency of the evidence to support the hearing officer's findings leading to his decision that the claimant's compensable injury is a producing cause of his current cervical problems and that an intervening injury or accident is not the sole cause of the current problems, we recognize that there was conflict and perhaps some inconsistency in the evidence before the hearing officer. Indeed, the hearing officer well recognized this and set out the evidence and his resolution of the conflicts in his decision and order. This is clearly a matter for and the responsibility of the fact finding hearing officer. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Section 410.165(a) and 410.168(a). Very briefly, it was stipulated that the claimant sustained a compensable injury to his neck on \_\_\_\_\_, which was diagnosed as a cervical strain. He was treated conservatively and returned to work on February 10, 1997, although, according to the claimant, with some medical

corroboration, the injury was not resolved. The claimant also experienced several incidents in March, a puncture wound to his hand and a sprained ankle from a fall, which the carrier urged was an intervening cause of the claimant's current cervical condition, herniated cervical discs as found by an April MRI. The claimant testified that neither incident in March affected his cervical or neck area, and that he had ongoing pain and symptoms that kept getting worse resulting in the diagnostic tests showing herniations. Statements in evidence from the claimant's doctor related the cervical herniations to the January compensable injury, although it appeared the claimant was off prescription drugs at some point in March. In any event, our review of the evidence indicates to us that it is sufficient and that the determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Accordingly, the decision and order are affirmed.

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

---

Joe Sebesta  
Appeals Judge

---

Susan M. Kelley  
Appeals Judge