APPEAL NO. 990437

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 January 26, 1999. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the injury did not extend to the thoracic or cervical areas or shoulders; and that the claimant did not have disability. The claimant appeals these determinations, arguing that she established a prima facie case of compensability and, in the absence of a sole-cause defense by the respondent (carrier), the hearing officer was compelled as a matter of law to find for the claimant on the disputed issues. The carrier replies that the claimant failed to meet her burden of proof by a preponderance of the evidence and that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked for a temporary employment agency. She testified that on _____, she was lifting boxes, estimated to hold 60 to 70 pairs of shoes, from a conveyor belt when her middle and upper back and shoulders started hurting. The claimant had gone to the doctor about two weeks before for the flu. When she came to work _____, she said, she was experiencing a general achiness, which included neck pain that she attributed to swollen glands, not muscle spasms. Because of this, she said, she believed her pain was part of her flu symptoms. She went to an emergency room (ER) on September 21, 1998, thinking she still had the flu. She said she did not specifically mention her back pain, thinking this was part of the flu. She was diagnosed with inflammation around the lungs which was thought to be causing her pain. Apparently, no x-rays were taken. She took antibiotics and went to work for another week. By Friday, September 25, 1998, she said, her condition had worsened so she returned to the ER and this time was told she had a pulled muscle in her back and placed on restricted duty. Only then, she said, did she realize she had injured her back at work.

The claimant next saw Dr. D, D.C., on October 2, 1998. He diagnosed cervical and thoracic sprain/strain, cervicobrachial syndrome, and muscle spasms and commented that the claimant "injured herself while lifting boxes off a conveyor belt turning back and forth." Dr. D referred the claimant to Dr. DU, who, on December 30, 1998, diagnosed thoracic radiculopathy and noted that a prior MRI showed cervical disc bulging. According to the claimant, Dr. D did not place her in a limited-work status, but referred her for physical therapy. She said the physical therapist told her she was unable to work. She also said she underwent a second MRI, but she had not yet heard the results.

The hearing officer commented in her decision and order that the medical evidence was insufficient to show a compensable injury on _____, from either specific or repetitive

trauma. Therefore, she found no compensable injury, extent of injury, or disability. The claimant appeals these determinations, arguing that her testimony, together with medical evidence of an injury, established a prima facie showing of a compensable injury which made the claim "compensable as a matter of law unless the carrier can show that the 'sole cause' of the injury was something that occurred outside of work." The claimant then correctly noted that there was "no mention of this made in the Decision and Order."

The claimant had the burden of proving by a preponderance of the evidence that she sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did was a question of fact for the hearing officer to decide. Sole cause was not an issue at the CCH. Regardless of whether a sole-cause issue has been raised, a claimant must always first prove the producing cause of an injury before the carrier has the burden of proving sole cause, and the failure of the carrier to prove sole cause is immaterial where the threshold issue of producing cause was not proved by the claimant. Texas Workers' Compensation Commission Appeal No. 951418, decided October 5, 1995; Texas Workers' Compensation Commission Appeal No. 950834, decided July 5, 1995; Texas Workers' Compensation Commission Appeal No. 950800, decided June 30, 1995. Simply because a carrier presents evidence of a preexisting injury or condition does not automatically mean that the carrier is asserting a sole-cause defense. Texas Workers' Compensation Commission Appeal No. 951608, decided November 10, 1995; Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. We cannot agree that the claimant's assertions that a so-called "prima facie" case shifts the burden to the carrier to prove sole cause or makes the injury compensable as a matter of law are correct statements of the law.

Though not raised by the claimant as error, it should be noted that generally a back injury alleged to be from specific or repetitive lifting trauma can be proved by the testimony of the claimant alone if found credible by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 960430, decided April 18, 1996; Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. This does not preclude the hearing officer from considering medical evidence nor does it suggest that, even when other complicating factors are present, medical evidence is not required. In the absence of a challenge to the decision on this basis in the case now before us, and given the claimant's admitted flu and her own assertion that her neck or upper back pain was caused by swollen glands and not a muscle strain, we find no error in the hearing officer's stated need for medical evidence to reach findings of fact and conclusions of law. The hearing officer was simply not persuaded by the claimant's evidence that she sustained an injury in the course and scope of her employment. Under our standard of review, we affirm that determination. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur, although I don't think "sole cause" had a thing to do with this case, because I believe that to be a concept related to "incapacity," most comparable to ability to work in the 1989 Act, rather than whether an injury occurred. In this case, when claimant argues that the carrier has the obligation to prove sole cause, she is really saying that the carrier has the burden of proof to show no injury. That is not the law; the claimant must always carry his or her burden of proving damage or harm resulting from the course and scope of employment. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The claimant does not merely have to show that something at work was a "producing cause," as opposed to an aggravation, if there is a preexisting condition. "Producing cause" is yet another concept relating more to disability or the "direct result" criterion for SIBS.

_____
Susan M. Kelley
Appeals Judge

CONCUR IN RESULT:

_____
Gary L. Kilgore
Appeals Judge