APPEAL NO. 990618

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 March 5, 1999. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that she did not have disability. The claimant appeals these determinations, contending error in certain evidentiary rulings of the hearing officer and that the her case was wrongly decided. The respondent (self-insured) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and remanded.

The claimant, a school custodian, testified that on Tuesday, _____, the day after the (holiday), she injured her back while throwing trash in a dumpster. The incident was unwitnessed. The claimant denied that she injured herself helping her daughter move into an apartment on the Sunday before her claimed injury. She offered testimonial and documentary evidence to support this latter assertion.

The carrier offered written evidence and the testimony of Ms. D, the head custodian, that the claimant appeared normal while mopping floors after the alleged incident and that the claimant commented to Ms. D and several others that she hurt herself helping her daughter move.

Although no issue was framed in terms of a "sole cause" defense to liability in this case, we note that the report of the benefit review conference (BRC) states the carrier's position as being that "the Claimant's activities in moving her daughter over the (holiday) Weekend are the sole cause of the Claimant's cervical and thoracic condition." No comments were submitted in response to this report. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier gave as the reason for the dispute that the claimed injury was not in the course and scope of employment and that the alleged injuries "occurred while [claimant] was off work for the weekend . . . rather than when she was throwing away trash at work on _____." A fair reading of the record in this case, we believe, compels the conclusion that the carrier was relying on a sole-cause defense.

The claimant has the burden of proving a compensable injury and disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). However, if a carrier asserts a sole-cause defense, the carrier has the burden of proving the defense. Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994. Although a carrier asserts a sole-cause defense, the claimant must still first prove the producing cause of an injury, that is, that the injury arose out of the course and scope of employment. Where the claimant fails to meet this burden of proof on this threshold issue of producing cause, it is immaterial whether the carrier fails

to prove sole cause. 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. In addition, simply because a carrier presents evidence of a preexisting or subsequent injury, this does not mean that the carrier is asserting a sole-cause defense. Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. A hearing officer should not consider a sole-cause defense unless it is expressly raised. Texas Workers' Compensation Commission Appeal No. 951608, decided November 10, 1995.

We believe the sole-cause defense was expressly raised by the carrier as reflected in the BRC report and its evidence, which almost exclusively focused on whether the claimant actually helped her daughter move into her apartment or simply stood around and watched others carry items into the apartment. The hearing officer appears to confirm this by describing the carrier's evidence solely in terms of a sole-cause defense. Despite this assertion of the sole-cause defense, the hearing officer did not place the burden of proof of the defense on the carrier. For this reason, we reverse the determinations of the hearing officer on both disputed issues and remand this case for a rehearing in which the burden is placed on the carrier to prove that the sole cause of the claimed injuries was the moving activities engaged in by the claimant on the weekend before _____.

With regard to the complained-of evidentiary rulings, the hearing officer excluded the one-page typed, but unsigned, statement of Ms. V, a friend of the claimant's daughter, for lack of timely exchange. Ms. V appeared at the CCH and testified as a witness for the claimant. Given the fact that she actually testified, any error in the exclusion of her statement was at best harmless. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Three written statements of carrier witnesses were admitted into evidence over the objection of the claimant that they were not timely exchanged. These dealt generally with what the claimant told them about her involvement in moving activities of the claimant's daughter. In large measure, the statements were cumulative of Ms. D's testimony. The statements were obtained on February 23 and 24, 1999, and were exchanged shortly thereafter. The carrier asserted that the claimant never identified these people as possibly having knowledge about the facts of her case and that as soon as the carrier discovered their identities, it took steps to obtain the statements. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(2) (Rule 142.13(c)(2)) provides for the exchange of witness statements as they become available. The hearing officer accepted the representations of the self-insured's attorney that the self-insured only found out that these people had relevant knowledge about the time the statements were taken and that the statements were exchanged as soon as they were received. We review evidentiary rulings under an abuse of discretion standard, that is, whether the ruling was made without reference to appropriate guiding principles or standards. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. The hearing officer applied the standard

set out in Rule 142.13(c)(2) in deciding that these statements were admissible. Under these circumstances, we find no abuse of discretion in these evidentiary rulings.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

_____
Dorian E. Ramirez
Appeals Judge