APPEAL NO. 991390

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990618, decided May 7, 1999, the Appeals Panel reversed the determination of the hearing officer that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability and remanded these issues for consideration in terms of a sole-cause defense by the respondent (self-insured) with appropriate placement of the burden of proof. The hearing officer, issued a decision on remand in which he again found that the claimant did not have a compensable injury and did not have disability. The claimant appeals these determinations, expressing her disagreement with them. The self-insured replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a school custodian. She testified that on the morning of _____, while attempting to place a bag of trash into the dumpster, she felt a pull in her back. She estimated the trash weighed between five and seven pounds. She kept working that day and told Ms. D, the head custodian, after lunch as they mopped floors that she hurt herself at the dumpster that morning. The claimant denied that she ever told anyone that she felt sore from helping her daughter move on the day before. She said that all she did that day was drive a car with the daughter's possessions to her daughter's new apartment, but that others loaded and unloaded the car. On direct examination, she denied prior back pain, but admitted going to a doctor for back adjustments, alignments, and manipulative therapy. On cross-examination, the claimant said that the back pain she had earlier been treated for was of a different kind and intensity than that she now experienced. An MRI disclosed cervical herniation

Several colleagues and coworkers testified or provided written statements that the claimant told them at the start of the work day on _____, that she was sore from helping her daughter move. Those involved in the move testified that the claimant did no carrying that day and only drove the car.

In Appeal No. 990618, *supra*, we wrote:

> 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.

In his decision and order on remand, the hearing officer commented that the "Claimant's evidence was insufficient to establish that her claimed injury arose out of the course and scope of her employment. As the claimant failed to meet this burden of proof on the threshold issue of producing cause, it is immaterial whether the Carrier failed to prove sole cause." He then determined that the claimant did not sustain a compensable injury as claimed and did not have disability. The claimant appeals these determinations, contending that she did meet her threshold burden and the self-insured did not then meet its burden of proving that the sole cause of her injury was moving her daughter. She also argues that her witnesses, that is, those who participated in the move, were "more reliable" than the statements of the coworkers because the latter were "so similar" and done well after the incident and that, if she really had hurt herself in the move, she would never have volunteered the information about the move in the first place.

The points raised by the claimant go to the weight and credibility to be given the evidence. It was the responsibility of the hearing officer to evaluate the evidence and determine what facts had been established. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709

S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Finding no error in the application of the law of sole cause and applying our standard of review to the resolution of factual issues in this case, we affirm the determination of the hearing officer that the claimant failed to establish that a producing cause of her injury was placing the trash bag in the dumpster.

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

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge