APPEAL NO. 941056

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). At a contested case hearing held on July 8, 1994, the hearing officer took evidence on the three disputed issues, namely, whether the respondent (claimant) sustained a compensable injury on (date of injury), whether he has had disability, and the amount of his average weekly wage. The latter issue was stipulated to at the hearing and the parties also stipulated that claimant's back injury prevented him from working from (date) through (date). The parties further stipulated that on (date of injury), claimant was driving a forklift at work when he sneezed and his back began to hurt. The hearing officer found that on (date of injury), claimant "was operating a forklift in the furtherance of Employer's business, when he sneezed, causing him to sustain a back injury." She concluded that he sustained a compensable back injury on that date and that he had disability from (date) to (date). The appellant (carrier) has appealed urging error in the determination that claimant sustained a compensable injury when he sneezed at work on (date of injury). Although the carrier has not specifically appealed the determination on disability, it asks that the entire decision be reversed. Claimant's response urges our affirmance.

DECISION

Reversed and a new decision rendered that claimant did not sustain a compensable injury on (date of injury).

Claimant testified that he had been employed by his current employer for approximately seven years; that he had had three prior injuries, namely, a back injury in 1987, a double hernia in 1988, and another back injury in (month, year); and that he underwent back surgery in August 1991, the month, according to the records, of his 30th birthday. His treating doctor, Dr. J, reported on February 1, 1993, that claimant had multiple level degenerative disc disease and that he had had and could be expected to continue to have episodes "of catching and locking up of his back" requiring therapy and medication. Claimant testified that on the afternoon of (date of injury), a Friday, he was operating a forklift in his employer's warehouse. He described as follows what occurred as he turned around to look rearward before backing up: "A bodacious sneeze just came upon me and when I sneezed I felt just a total layering of pain in my back and down my left leg and . . . it just went completely numb." In an unsigned transcript of a recorded interview given on March 16, 1994, claimant, after indicating that he could not recall whether he was coming in or going out of the warehouse door on the forklift when he sneezed, described the incident thusly: "But ah, as I was going out that door, I, it seems like a big old sneeze just came from right out of nowhere and usually, ah, whenever I feel a sneeze coming I try to get myself prepared for it and this time I didn't have a chance to prepare for it and when I sneezed I just felt like an enormous amount of pressure in my lower back. And it went down my left leg. It was a really unusual sensation."

Claimant acknowledged that he had sneezes before the (date of injury) incident and said that when he felt one coming on, he would try "to prepare for it;" but that on this occasion, it came upon him as he was turning around on the forklift to look rearward for

safety purposes and he did not have a chance to get prepared for it. He conceded he did not mention, when interviewed by carrier's adjuster, that there was present at his workplace any environmental factor which caused the sneeze, saying he had not thought about it. Nor did he contend at the hearing that his sneeze was caused by any work place environmental factor. He said he finished his shift and that the next day at home he sneezed again. Asked about a medical record entry referencing a sneeze on Saturday as making him feel worse, claimant first testified that it did not "make anything any worse," but later said it did make him feel worse. He could not return to work on Monday and went to the (the Center) for treatment several days that week. The Center record of January 31, 1994, stated the "onset of this episode" as "(date of injury)" and also reported that claimant stated he had noticed "feeling some increased tightness in his low back. On Saturday (date of injury), he thinks he sneezed and since that time he has been getting worse."

Claimant further testified that on February 9, 1994, he underwent back surgery for the removal of the disc at L5 and a free-floating fragment from the L4 disc. Dr. J's operative report stated the preoperative diagnosis as: "Disc rupture of L4-5, recurrent, with free fragment, and disc rupture of L5-S1 more recent."

Claimant said that his treating doctor, Dr. J, told him he had a "new injury" because he had left-sided sciatica. Dr. J's March 3, 1994, letter states the following: "This was a new injury. He previously did not have sciatica and left leg sciatica prior to that. So this is indeed a new injury." However, claimant conceded that while his problems were primarily right-sided before his August 1991 surgery, he thereafter began to have problems on the left side, reported left side pain in July 1992, was told he had "a facet joint," and was given shots for it. In a June 13, 1994, report following a review of claimant's records, Dr. P indicated disagreement with Dr. J's opinion, stating: "It is the opinion of the examiner that the `sneeze' that occurred in (date of injury) was not a sufficient enough trauma to cause a new abnormality unless there was significant pre-existing disease present at the injured site. I think for all practical purposes this sneeze exacerbated a pre-existing problem and may have changed a mild herniation to a somewhat larger herniation to increase his symptoms. In view of this, I think this absolutely must be classified as an exacerbation of a pre-existing problem rather than a new or acute injury."

The carrier argued to the hearing officer that this case presented a question of first impression in terms of the compensability of an injury caused by a sneeze at work, that two Appeals Panel cases dealing with sneezes (Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992, and Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993) were distinguishable, and that this case is analogous to an idiopathic fall at work and other idiopathic scenarios where an employee has pain but no accidental injury. In her discussion, the hearing officer also saw the case as one of first impression and analogous to cases involving idiopathic falls. However, the hearing officer drew such analogy in the claimant's favor stating her reasoning as follows:

> Case law indicates that an idiopathic fall, or other idiopathic condition, may give rise to a compensable injury; cases which Carrier has cited in support of its argument to the contrary are not applicable to this case. See, Appeals Panel Decision #93120, and cases cited therein. Therefore, although Claimant's sneeze apparently was idiopathic in origin, it did result in Claimant sustaining an injury while he was furthering the interests of his employer; therefore, the back injury Claimant sustained on (date of injury), is a compensable injury.

While we disagree with the hearing officer that claimant's injury caused by his sneeze was compensable under the circumstances of this case, we do find apt her analogy of this case to the line of cases involving unexplained falls at work. We also agree with the hearing officer that the prior Appeals Panel decisions relied on by the claimant are distinguishable. In the one decision involving a sneeze, Appeal No. 91117, *supra*, the employee's forklift fell about four inches while he was on it and bent over at the time and he felt pain in his back, but did not seek medical treatment. Twenty-nine days later, while preparing to go to work, he was bending over to tie a shoelace, sneezed, had severe pain, and went to an emergency room for treatment. The carrier in that case asserted that the sneeze was the sole cause of the employee's disability. The hearing officer found that the disability resulted from injury sustained in the forklift incident. The Appeals Panel affirmed noting the employee's problem to be "a paucity of evidence indicating that the subsequent sneeze was the sole cause." Also distinguishable are the decisions in Appeal No. 93767, *supra*, and Texas Workers' Compensation Commission Appeal No. 94196, decided April 4, 1994, which involved employees who first injured their backs at work and subsequently aggravated those injuries at home bending over to lift children.

We begin our analysis with the definition of a compensable injury which the 1989 Act defines as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle. [Emphasis added.]" Section

401.011(10). Course and scope of employment are defined to mean "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include: [transportation and travel provisions omitted.]" Section 401.011(12).

The sole case we have found involving a sneeze at work which caused an injury (discussed below) was included by Professor L in his discussion of case law on unexplained falls at work which, in turn, is part of his discussion of the requirement that the injury "arise out of" the employment, an issue of causation. Accordingly, for guidance by analogy, we examine the law relating to unexplained falls at the workplace. In 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 10.31(a) (1993), a number of cases involving unexplained falls are summarized. It appears that some courts among the several states have distinguished between totally unexplained falls at work, from which resultant injuries are found to be compensable, and falls at work traceable to an idiopathic condition of the employee requiring the employee to show that the injury was not caused by the idiopathic condition.[1] In Texas, however, falls at work seem not to have turned on the distinction between unexplained and idiopathic falls. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ), involved an employee who fainted at work from high blood pressure and who was subsequently injured falling from the employer's defective stretcher. The parties agreed the only possible source of her injuries was falling from the stretcher and further agreed that the underlying cause of her fainting was the high blood pressure. The employee urged that her case resembled those holding that injuries sustained in a fall at work are compensable notwithstanding the fall may have been due to a pre-existing idiopathic condition, and cited Garcia v. Texas Indemnity Insurance Co., 146 Tex. 413, 209 S.W.2d 333 (1948). The Bush court stated the law on unexplained falls at work as follows:

The test, stated in *Garcia*, is:

> If, except for the employment, the fall, though due to a cause not related to the employment, would not have carried the consequences it did, then causal connection is established

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[1]The term "idiopathic" is defined as: "1. arising spontaneously or from an obscure or unknown cause: primary; 2. peculiar to the individual." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY at 598 (1990). Idiopathic refers to an employee's pre-existing physical weakness or disease which contributes to the injury. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 12.00, at 3-349 (1993).

> between the injury and employment, and the accidental injury arose of the employment. *Id*. at 336.
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> Bush claims that the `but for' test was met because the accident occurred on the employer's premises and was caused by defective property of her employer. [Citation omitted.]

We agree that if Bush had fallen at the time of her initial fainting and had been injured by hitting the floor or any other instrumentality of her employer's business, her injury would clearly lie within the criteria of *Garcia* and its progeny. [Citations omitted.] The difference here is that the idiopathic condition, high blood pressure, did not directly cause the fall that inflicted the injury; instead, it triggered a chain of events that resulted in Bush's being placed on a faulty instrumentality (the stretcher) of the employer. Therefore, the issue is whether Bush was in the course and scope of employment while she was on the stretcher and at the moment of impact.

Whether an employee is in the course and scope of employment when he receives an injury is ordinarily a question of fact. [Citation omitted.] Each case must be determined on its own peculiar facts. [Citation omitted.]

The Appeals Panel has also had occasion to consider the compensability of injuries sustained from falls at work. In Texas Workers' Compensation Commission Appeal No. 92211, decided July 10, 1992, the Appeals Panel considered the case of an employee who while working fell to the ground from a flatbed trailer sustaining injuries. In affirming the hearing officer's decision that the employee sustained an injury in the course and scope of employment, the Appeals Panel, noting the necessity for showing a causal connection between the conditions under which the work must be done and the resulting injury, reviewed a number of Texas cases involving falls at work from other than work-related causes as follows:

> In its first pronouncement on the issue, the Texas Supreme Court considered the case of an employee who, in suffering an epileptic fit at work, fell and fatally fractured his temple on the sharp edge of a post at his workplace. The jury found that the fracture could have in all probability caused the death. The court held the death compensable, saying that the fall resulted in an injury which was in turn a producing cause of death, "although the fall may have been due to a pre-existing idiopathic condition. . . . It is the injury arising out of the employment and not out of disease of the employee for which compensation is to be made. Yet it is the hazard

> of the employment acting upon the particular employee in his condition of health and not what that hazard would be if acting upon a healthy employee." Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex. 1948), citations omitted.
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> *See also* American General Insurance Company v. Barrett, 300 S.W.2d 358 (Tex. Civ. App.-Texarkana 1957, writ ref'd n.r.e.) (claimant blacked out, fell to ground and fractured skull; death compensable where caused by or contributed to by fracture; pavement was instrumentality essential to work of employer and falling against it was hazard to which employee was exposed because of employment.); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977) (claimant's injury from fall to ground at work caused by buckling of his knee from idiopathic origin raises fact issue of whether parking lot surface contributed to injury and, if so, whether surface represented such a hazard within the scope of employment as to allow recovery).

See also Texas Workers' Compensation Commission Appeal No. 931083, decided January 10, 1994, affirming the hearing officer's decision which determined that the employee, who had fainted at work for an unknown reason while standing by a desk making a telephone call, sustained a compensable injury; and Texas Workers' Compensation Commission Appeal No. 93836, decided November 1, 1993, affirming the hearing officer's decision which determined that the employee, who fell at work as a result of losing consciousness or having a seizure from a subarachnoid hemorrhage due to a ruptured aneurysm, sustained a compensable injury.

Our reading of the Texas cases involving injuries from either totally unexplained or idiopathic falls at work reveals that the injuries associated with such falls involved some instrumentality of the employer such as contact with a floor or hardened parking lot surface. As we commented in Appeal No. 93836, *supra*, "the courts upheld the employees' recoveries on the apparent basis that notwithstanding that the falls themselves were due to preexisting or idiopathic conditions, the consequent injuries (fractured skulls and injured knee) to the employees . . . resulted from contact with an object or the pavement at the work site." In the case we consider, however, there was no evidence that any instrumentality of the employer was involved, or that the employment exposed claimant to any particular hazard or otherwise made any contribution to claimant's back injury. Claimant did not contend that his apparently spontaneous sneeze was caused by any factor in his work environment. Nor did he contend that he fell from the forklift or was jarred by the forklift or that he struck his back or any other body part on the forklift when he sneezed. All the evidence established was that claimant simply sneezed at the workplace and the sneeze resulted in his back injury. *Compare* Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ, App.-

Waco 1965, writ ref'd n.r.e.), where the employee, who was bending, stooping or squatting to paint a tank and who turned around when someone spoke to him and injured his back, was found to have sustained a compensable injury. The court's opinion stated: "It is held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable. [Citation omitted.] In our opinion the reason for plaintiff's turning and the turn were incidents of his employment." *Id.* at 905-906.In our view, the failure of the evidence to establish any nexus between claimant's employment and his back injury, other than merely sneezing at the work place, requires that we reverse the decision and render a decision that claimant did not sustain a compensable injury. We regard this case as similar to Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied), where the court reversed and rendered a decision that under the "positional risk" test, the deceased employee's rupture of an aneurysm while using a bathroom at work was not compensable. The court noted that that test "focuses the court's inquiry upon whether the injury would have occurred if the conditions and obligations of employment had not placed the claimant in harm's way. . . . In this case, the aneurysm could have burst at any time." The court went on to reason that the injury did not arise "but for" the employee being at work, that it was "due to a personal defect which proved to be fatal from a strain totally unrelated to the deceased's employment," and that the risk was one the employee "would have confronted irrespective of any type of employment." *Id.* at 722.

We distinguish Grimes v. Mayfield, 564 N.E.2d 732 (Ohio App. 1989). In that case, the appeals court reversed a lower court's denial of a motion for new trial and remanded the case to the trial court holding that the employee, who sneezed while operating a press at work and dislocated his shoulder, sustained an injury which arose out his employment. The evidence indicated that in the operation of his press the employee was required to raise his arms above his head to operate switches, and that it was while his arms were thus extended overhead that he sneezed and dislocated his shoulder. According to the court's opinion, "the expert medical evidence is undisputed that `it was not so much the sneeze per se,' but rather the position of his raised arms and the movement caused by the sneeze that resulted in the shoulder dislocation." The court stated its disagreement with the employer's contention that the injury did not "arise out of*" the employment because the employee did not show the injury occurred as a result of some risk or hazard of the employment. Discussing Ohio court decisions concerning injuries from falls at work (after the elimination of idiopathic causes for unexplained falls), and analogizing the sneeze to such falls, the court held that "[t]he inference was reasonable that the fall [sneeze] was caused by the employment environment once claimant meets his burden of eliminating idiopathic causes and there is no evidence that any force or condition independent of the employment caused the fall [sneeze]." Distinguishing the facts in Grimes, we note that the employee was required to extend his arms above his head to

perform part of his job, and that the medical evidence indicated that it was not the sneeze per se but rather the sneeze in combination with claimant's extension of his arms and the movement created by the sneeze which caused the shoulder dislocation. Thus, there was the presence of a hazard at the job to which that employee was exposed when he sneezed. No similar hazard or nexus was established by the claimant in the case we here consider and it was he who had the burden to prove that his injury was compensable.

The decision and order of the hearing officer are reversed and a new decision is rendered that claimant did not sustain a compensable injury on (date of injury), and that he did not have disability resulting from such injury.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge