APPEAL NO. 941436

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. CODE ANN. 401.001 *et seq*. (1989 Act). On September 26, 1994, a contested case hearing (CCH) was held. The unresolved issues presented to the hearing officer were:

1. Did the Claimant sustain a compensable injury on (date of injury); and,
2. Did the Claimant have disability resulting from the injury sustained on (date of injury);

The hearing officer determined that the claimant sustained an injury while in the course and scope of employment on (date of injury), (all dates from here on are 1994) and that the claimant has had disability since that date. The appellant, carrier herein, contends that the hearing officer erred as a matter of law because claimant failed to show his injury "arose out of" his employment, that claimant's fall was an "idiopathic" injury and as such is not compensable and that the hearing officer's decision regarding the injury is against the great weight and preponderance of the evidence. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence, rebuts carrier's legal points and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that he is 37 years old and was employed as a driver/general laborer by (employer), employer and that on (date of injury) he was moving furniture from one apartment to another for one of employer's clients. Claimant testified that as he was assisting in moving a sleeper/sofa up the stairs to the second floor he " . . . was having trouble breathing . . . didn't feel very good at all . . . . chest was hurting . . . arm was hurting. . . ." Claimant said that he told his coworkers that he didn't feel good, and went back downstairs to catch his breath. Claimant testified he was " . . . leaning up against that pillar . . . . and the next thing . . . . [he] was sitting on the ground." Claimant said that he was sitting on the ground and that his chest and arm were hurting, that he was still having trouble breathing and that he had a bad headache. Claimant said that he called to his coworkers and supervisor, was taken by car to a nearby hospital where he was admitted on (date of injury) and remained for four days. Claimant testified that he was treated by Dr. K, that a heart attack was ruled out, x-rays were taken and that Dr. K had told him that he fell because "I got too hot." Claimant's initial x-ray taken June 17th showed no fracture or acute injury to the right elbow. A few days after his discharge claimant said that he went back to Dr. K because his " . . . arm was still hurting real bad." Dr. K ordered additional x-rays which claimant said "showed a nondisplaced fracture of the radial bone right at the head of the radial bone." The x-ray report dated June 24th states "Essentially non-displaced fracture of the right radial head."

A subsequent x-ray of the right forearm taken on July 25th however, was negative, and stated "The radial head fracture thought to be seen on the prior exam is not

demonstrated on these images." Claimant testified that the doctor said the reason the fractures didn't show up on this x-ray was because the x-ray was of the forearm and " . . . it is hard to find that exact spot on my arm where it is broken." Claimant has been treated conservatively for his arm condition.

Claimant testified that he has not worked since (date of injury), that he has a lifting restriction of 20 pounds, that he has sought employment from several sources but that his arm injury precluded him from obtaining employment.

Claimant's position at the CCH was that he "sustained an idiopathic fall" and that the injury to his right arm sustained in that fall is compensable. Claimant cities as authority Director, State Employee's Workers' Compensation Division, v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ); General Insurance Corporation v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1991, and Texas Workers' Compensation Commission Appeal No. 931083, decided January 10, 1994. Carrier's counsel responded that he is very familiar with Appeal No. 931083, having filed the appellate brief in that case. Carrier cited several cases, distinguished Wickersham, and argued that Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied) is directly on point. Carrier argued, as it apparently did in Appeal No. 931083, that there should be a two pronged test for compensability, one prong that the employee be "engaged in or about the furtherance of the employer's affairs . . . ." and the other prong that the injured employee must show that the injury was of a kind and character that had to do with the employer's work.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

3. On (date of injury), Claimant was injured while at work after he had moved a sleeper/sofa up some stairs, had trouble breathing, and sustained a fall after becoming overheated and dizzy.

4. As a result of Claimant's fall, Claimant sustained a non-displaced fracture of the right radial head of his right elbow.

5. Since (date of injury), Claimant has been unable to obtain and retain employment at his preinjury wages due to his compensable injury.

CONCLUSIONS OF LAW

2. On (date of injury), Claimant sustained an injury while in the course and scope of his employment.

3. Since (date of injury), Claimant has had disability as a result of his

compensable injury, as defined in the Act.

Carrier appealed on basically three grounds: 1) the addition of the words "arise out of" in the 1989 Act created an additional requirement with the claimant to show that there was an "increased risk" or "peculiar risk" in claimant's work that resulted, or caused the injury; 2) that an "idiopathic" fall is not compensable under Bratcher; and, 3) that the evidence does not support the hearing officer's determination that claimant "suffered a non-displaced fracture of the right radial head of his right elbow."

Section 406.031 provides that a carrier is liable for compensation if "(2) the injury arises out of and in the course and scope of employment." Course and scope of employment is defined in Section 401.011(12) as:

> . . . 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 phrase "arises out of" however, is not defined in the 1989 Act and the carrier argues "Every word of a statute is presumed to have been used for a purpose . . . . This rule is not altered by the fact that the legislature has not defined a particular word or phrase. . . ." citing Eddins-Walcher Butane Co. v. Calvert, 298 S.W.2d 93, 96 (Tex. 1957). Carrier argues that by adding the words "arises out of" the legislature intended to adopt "the British Compensation Act formula." Although we do not have carrier's appellate brief filed in Appeal No. 931083, apparently the same or similar argument was made in that case which is now being urged in this case. Carrier concedes, both at the CCH and on appeal, that the Appeals Panel addressed its argument in Appeal No. 941083, and rejected it, but asks us to " . . . reconsider the position taken in that case . . . . " This we decline to do. We find nothing in the legislative history or in Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, authored in part by a legislator who also authored a portion of the 1989 Act, which would support carrier's theory. In Appeal No. 931083 the Appeals Panel discussed Page v. Texas Employers Insurance Ass'n, 544 S.W.2d 452 (Tex. Civ. App.-Dallas 1976, writ granted) and Texas Employers Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977), a case in which a security guard, while on duty, felt his knee buckle and fell on that knee on the parking lot surface, a case which was ultimately found to be compensable. In discussing carrier's argument in Appeal No. 931083, the Appeals Panel recited that carrier:

> . . . discussed Garcia v. Texas Indemnity Company, 146 Tex. 413, 209 S.W.2d 333 (1948), stating that in that case the court found the injury "arose out of his employment, because it had causal connection with his injuries, either through its activities, its conditions, or its environments." (Emphasis added). Carrier was also said to have argued that the pavement presented no "hazard which was peculiar to his employment." The court referred

> favorably to General Insurance Corporation v. Wickersham,, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), and quoted from it, in part, "[w]e can find no reason for denying a recovery where the fall is to the floor . . . Suppose the employee had fallen against a counter or showcase. It seems clear that a recovery would be allowed under the Garcia case . . . . " The court then concluded that a fact issue had been raised as to whether Page's injury originated out of the employment, "whether there was a sufficient causal connection" and affirmed the decision to remand the case.

We are not persuaded by carrier's contention that the addition of the words "arises out of" adds the requirement by the claimant to show that the injury is peculiar to the work. As the Appeals Panel stated in Appeal No. 931083:

> With case law considering whether an injury arose out of the employment as part of the question of causal connection, the 1989 Act in using the term "arises out of" did not add an element that had not been considered before. Texas Workers' Compensation Commission Appeal No. 92211, decided July 10, 1992, dealt with a fall from a trailer to the ground after fainting. The Appeals Panel in discussing the same Page, Garcia, and Barrett, cases did not limit their authority because the 1989 Act had added the words "arises out of" to the criteria for finding liability.

It is our interpretation, in the absence of legislative history, statutory definition or definitive Texas case law on this specific point, that the addition of the language "arises out of" was not intended to make the workers' compensation law more restrictive requiring a claimant to prove the injury was peculiar to his work. 1 LARSON, THE LAW OF WORKMENS COMPENSATION 6 - 7.40 (1994), including a March 1994 supplement for "unexplained falls," seems to indicate a looser standard rather than a more restrictive standard in interpreting what places an employee in the course and scope of employment.

We believe that the instant case is much stronger, and can be distinguished from many of the cited cases where the injured employee suffered an unexplained fall. In the instant case claimant was assisting in carrying a sleeper/sofa (something that common knowledge would accept as being very heavy) up a flight of stairs. Apparently, as a direct result of this exertion, the hearing officer found as fact, that claimant "sustained a fall after becoming overheated and dizzy."

Carrier also contends that claimant's fall was "idiopathic"" which carrier defines as "peculiar to the individual" or "arising spontaneously or from an obscure or unknown cause." Carrier argues Bratcher is controlling and that "no idiopathic fall case in Texas has ever held that the fall itself is compensable." Claimant, in response, concedes that he (or his attorney) had argued at the CCH that he had sustained an idiopathic fall. However, we, and claimant on appeal, note that the hearing officer did not base her decision on whether claimant's fall was idiopathic or not, or whether idiopathic falls are

compensable. Rather the hearing officer, as noted in the previous paragraph, determined that after moving a sleeper/sofa up some stairs, claimant "sustained a fall after becoming overheated and dizzy." Consequently, the hearing officer's decision is not based on an idiopathic fall theory. To some extent this case is similar to Appeal No. 931083, *supra*, only stronger. In Appeal No. 931083, the employee was standing by her desk when she fainted. In the instant case, claimant had helped move a sofa/sleeper up a flight of steps which had caused him to become overheated and dizzy and subsequently fall. The hearing officer, could, and perhaps did, believe that claimant's moving of the sleeper/sofa was the direct cause of becoming overheated, dizzy and falling.

Carrier argues the evidence was insufficient to support the hearing officer's determination that claimant had suffered a non-displaced fracture of the right radial head of his right elbow, citing the three sets of x-rays, two of which fail to show the fracture. The first x-ray was apparently done while claimant was still in the hospital and the primary concern appeared to be to rule out a heart attack. The second x-ray which showed the fracture was ordered when claimant returned to the doctor complaining of continuing arm and elbow pain. It is not clear what the circumstances of the third set of x-rays were but the x-rays were of the "Forearm 2 views: Right." Dr. K explained, at least according to claimant, that because the x-rays were of the forearm they might not show a fractured elbow. In any event, the hearing officer is the sole judge of the weight and credibility to be given to the evidence, Section 410.165(a). As such it was for the hearing officer, as the trier of fact, to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could find that one set of x-rays and the doctors notes were more persuasive than another set of x-rays. We find there is sufficient evidence to support the hearing officer's determination that claimant sustained a non-displaced fracture of the right radial head of his right elbow based on the second set of x-rays and doctor's reports.

Finding no reversible error, and the conclusion of law that claimant sustained a compensable injury from falling after becoming overheated and dizzy, to be supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unjust, In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951), we affirm the decision and order of the hearing officer.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge