APPEAL NO. 950524
FILED MAY 19, 1995

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act), a contested case hearing was held on March 7, 1995. He (hearing officer) determined that the respondent's (claimant) neck and shoulder injury is causally related to his compensable injury of _____, and also compensable. The appellant (carrier) appeals urging that there is no evidence or insufficient evidence to support the determination of the hearing officer and that the evidence clearly shows that the claimant's "alleged injury at home" was not causally related to the compensable injury of _____. No response has been filed.

DECISION

Finding error, we reverse and render a new decision that the claimant's neck and shoulder injury is not compensable.

On _____, the claimant sustained a work-related injury to his right knee when it hit something hard after he was either thrown off or jumped off a tractor while mowing grass. He testified that he crawled out and walked away from the tractor and stated to a leadman that he didn't know if he was hurt or not. In any event, a "few days later" he began to experience pain in his knee and swelling in his ankle and went to a doctor. According to the claimant, then 54 years of age, the doctor treated him for arthritis and took him off work. He also saw other doctors including an arthritis specialist. He stated that he experienced some instability in his knee and it would give way on occasion. (There are no pre-(date), medical records in evidence documenting any such incidents). It is unclear from the evidentiary posture of the case as to whether he returned to work with the employer at any time up to late September 1994; however, there was evidence together with a video that the claimant worked in a family owned and operated bar. The video, which was taken in October 1994, shows the claimant loading a beer cooler and also carrying a case of beer on two separate occasions. The claimant stated that he was basically "the boss" of the business and did not work that much.

The claimant testified that sometime in late September or early October 1994 (hereafter referred to as late September), he was mowing grass at his home. (We note the hearing officer apparently made a typographical error as his finding of fact No. 6 indicates "1993.") He states that he noticed an oil leak in his lawn mower and that he "was fixing to bend down and see about the oil leak or something, and my knee gave away with me and I fell." He apparently fell hitting his right side against the wall of a close by building. Although his knee did not "get weak all the time," he stated this was not the first time he had problems with his knee while mowing grass at home. He stated that his doctor would tell him he probably needed more physical therapy and that he, the doctor, would tell the claimant to "start doing activity--work--do some type of work that you normally do. . . ." In any event, sometime following the incident in late September, the claimant complained of problems in the right shoulder area. It was later

determined, following an MRI on November 5, 1994, that the claimant had a herniated disc at the C3-4 level, along with other problems.

The claimant saw his treating doctor, Dr. H, on October 3, 1994, whose report reflects possible cervical radiculopathy. In a subsequent letter dated November 15, 1994, Dr. H states in part and apparently agrees with the following:

> I received a letter from [Dr. HO] who, as state above saw him on October 6, 1994. He felt that [claimant] has arthritis of his knee and now has some medial compartment narrowing on the right. He felt with his combination of poor muscle strength in his leg in part is due to the injury itself and inactivity as well as the extra weight he was carrying would result in (claimant) being symptomatic indefinitely. He felt that he needs to be into a strengthening program for his quads, hamstrings and to lose weight and that there was a good chance that his symptoms would improve. He felt there was no active orthopedic treatment available at this time that would offer any benefit.

Dr. H in a letter dated February 21, 1995, stated his opinion that the claimant's arm and neck pain subsequent to his fall in late September 1994 was a work-related injury because "the injury was sustained because of the knee giving out on you, with the knee being a work-related injury problem" and "therefore, it was a problem that arose secondary to a work-related injury."

The hearing officer determined that the _____, injury to the knee resulted in disability and that in late September 1994, the knee gave way causing the claimant to fall against a building. His conclusion of law is that the "neck and shoulder injury is causally related to his compensable injury of _____, and is therefore also compensable as an injury in the course and scope of employment." We do not agree with the hearing officer's application of law to the facts of this case and consequently reverse his decision and render a new decision that any injury resulting from the late September fall is not a compensable injury.

In Texas Workers' Compensation Commission Appeal No. 941575, decided January 5, 1995, we reversed and rendered in a case involving a subsequent injury. There, a claimant had sustained a serious compensable injury on (date of injury), resulting in no motor or sensory function below the waist. On (date of subsequent injury), at a family cookout some sparks apparently landed on the claimant's leg and burned him before he realized it. In reversing the award of benefits based upon the burns and subsequent infection being a result of the 1992 injury, the Appeals Panel considered whether the subsequent injury was the direct and natural result of the original compensable injury and rejected the concept that brings within the ambit of compensable injury every consequence that arguably may not have occurred "but for" the original compensable injury. In Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992, a case involving a claim for injury to a thumb

and wrist resulting from falls at home occasioned while exercising a knee weakened by surgery following a prior compensable injury, we noted, in affirming the denial of compensability, the fact that an injury may affect a person's resistance will not mean that a subsequent injury outside the work place is compensable. In Texas Workers' Compensation Commission Appeal No. 94557, decided June 21, 1994, in reversing and remanding a determination of compensability involving a subsequent claim for a back injury resulting from a weakened back caused by a two year earlier compensable back injury, we stated:

> If a weakened condition is to form the basis for a compensable aggravation injury well into the future because the results of that incident would not have been as great but for the weakened condition, there must be proof, based upon reasonable probability and not mere possibility, that the incident was caused by or directly related to a compensable injury.

We find a great similarity to this case in Texas Workers' Compensation Commission Appeal No. 94067, decided February 28, 1994, where we upheld the determination of noncompensability of a subsequent back injury following a prior compensable knee injury. In that case, the claimant, who injured his knee in a compensable injury in (date of injury), testified that he re-injured his right knee and back while at home in (date of subsequent injury) while walking to his house from the back yard. He stated his knee locked up (which it did occasionally) and he twisted his body to keep from falling and felt something in his back subsequently diagnosed as a herniation. While noting that the compensability of a subsequent injury is generally one of fact, the Appeals Panel concluded the hearing officer correctly applied the law to the facts. In its decision, the Appeals Panel stated:

> The hearing officer in this case made a finding that the injury to the claimant's back did not naturally result from the damage or harm to the physical structure of his body at the time of the injury on (date of subsequent injury), and thus he concluded that the claimant did not injure his back in the course and scope of his employment as a result of a compensable injury. In his discussion of the evidence he relied upon the language in Maryland Casualty Co. v. Rogers, [86 S.W.2d 867 (Tex. Civ. App.-Amarillo 1935, writ ref'd)] in stating that claimant's lowered resistance to falling does not make compensable a subsequent injury which does not "flow naturally" from the original injury. The court in that case [in discussing causal connection] also stated that the cause of the injury "set in motion [earlier] . . . operated continuously through a sequence of events, each flowing naturally from one to the other. . . ."

Similarly, in Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993, we upheld the determination that a claimant did not sustain a compensable back injury when she fell on (date of subsequent injury), at home, which fall she asserted was caused by her foot giving way due to its condition

from a compensable foot injury on (date of injury). *See also* Texas Workers' Compensation Commission Appeal No. 941383, decided November 28, 1994; Texas Workers' Compensation Commission Appeal No. 93574, decided August 24, 1993; Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994. We cited several cases in Appeal 93672, *supra*, where compensability of a subsequent or follow on injury was upheld and which noted it generally was a question of fact. The cases cited, however, involved a direct flow of events in showing causal relationship; a back condition caused by a changed or altered gait following a knee injury, and an injury resulting from physical therapy treatment for a compensable injury. The situation in the case under consideration and those cited above where compensability has been found are markedly different. Here there is distinct, non work-related activity involved in the subsequent injury, the injury is to a distinctly different body part, there is a lengthy period of time between the injury and the claimed subsequent injury, there was at most only a degree of weakening or lowered resistance, and there is a lack of reasonable medical probability evidence establishing the necessary causation (as opposed to a "but for" analysis from Dr. H). We conclude that this case falls squarely within the precedent of previous Appeals Panel decisions discussed above and in applying the standard of such precedent to the facts developed in the evidence, the conclusion of law is erroneous. Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993. Appeal 93725 involved a claim for injury (carpel tunnel syndrome (CTS)) to the right hand from increased use as a result of an earlier compensable injury to the left hand. In reversing a determination that the right hand CTS was compensable, the majority stated "this is simply too remote to the initial injury to bring it within the definition of injury or cast it as a consequence of required medical treatment and that it was not "a direct and natural" result of the earlier compensable injury. Accordingly, we reverse the decision of the hearing officer and render a new decision that any neck and shoulder injury resulting from the late September 1994 fall is not compensable.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge