

APPEAL NO. 951544
FILED OCTOBER 26, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 17, 1995, a contested case hearing was held. She (hearing officer) determined that respondent's (claimant) neck injury of _____ was compensable since it was found to have occurred "from physical therapy" prescribed for the compensable back injury claimant sustained on _____. Appellant (carrier) asserts that medical treatment for the compensable injury had ceased and the neck injury was not compensable; carrier asks that the decision be reversed and rendered. Claimant replies that the decision should be upheld.

DECISION

Reversed and rendered.

Claimant was working for (employer), on _____, when he slipped on a wet floor and fell. Claimant testified that he complained of injury to his "whole back" but that the doctor concentrated on the injury to his low back. According to the medical records in evidence, claimant had disc surgery at L5-S1 in April 1993. Thereafter, Dr. S, claimant's treating doctor, in June 1993 noted that claimant "is to have PT and return" In July 1993, Dr. S noted that claimant should "continue PT program, stay off work for another 6 weeks and return for re-evaluation at that time." In September 1993, Dr. S noted under "Plan," that claimant "should finish with his PT program and . . . return to normal employment." At this visit, Dr. S also said that PT should be continued for "4 more weeks." In October 1993 Dr. S said that claimant should return to work and should return in three months for a reexamination. In December Dr. S indicated that claimant was working and simply prescribed certain medication. (Claimant testified that he did return to his employment in 1994 but was laid off six weeks later.) In January and March 1994, respectively, Dr. S remarked that claimant had had "difficulty maintaining a walking program" but recommended that he "should gradually increase his walking." Dr. S also noted in March that claimant was coping "fairly well" with work.

On June 28, 1994, Dr. S performed an examination of claimant noting that he was over one year post surgery. Dr. S found and certified that claimant reached maximum medical improvement (MMI) on June 28, 1994, with 13% impairment (IR). He also said:

The patient should follow instructions in the back booklets . . . He is presently walking 1 mile a day and should keep this up. He is discharged to return prn.

Claimant then states that he fell while walking, three months later in _____, injuring his neck, which he said had been painful for several months prior to the fall.

The only issue at hearing was whether a neck injury also occurred when claimant hurt his low back in _____. The hearing officer made it clear in her opinion and findings of fact that she found no injury to the neck occurring on _____, and no appeal was taken to that determination. The hearing officer did find that Dr. S "prescribed walking as therapy to treat the effects of the compensable injury . . ." and that "the neck injury claimant sustained in _____ occurred while claimant was performing physical therapy prescribed to treat the effects of claimant's compensable injury of _____."

In reviewing the above sequence of medical care claimant received, we do not mean to imply that words of art must be used by a physician in providing a description of his treatment. See Texas Workers' Compensation Commission Appeal No. 950710, decided June 8, 1995, in which the words "reasonable medical probability" were said not to ordinarily be required in order to imply probability in a doctor's opinion, but such standard was not implied when a physician rejected the use of "reasonable medical probability." We do observe that Dr. S regularly used the phrase, "physical therapy," during the months of June, July, and September 1993; and, when "physical therapy" was so mentioned, however, it always was in the context of claimant returning in a certain time and when mentioned in the latter months of July and September, an expected length of time was also placed on the physical therapy.

In contrast, Dr. S refers to claimant's walking in 1994 without reference to physical therapy, does not set time limits for it, does not indicate that he will evaluate claimant thereafter to gauge the result of the walking, and in the latter instance in June 1994, does not even propose a date for claimant to ever return--and he also found claimant to be at MMI at that time. We believe this observation of the difference between physical therapy ordered in 1993 and the 1994 reference to walking is supported by Dr. S's advice, also in June 1994 at MMI, to claimant generally to follow "back booklets" in his activities.

The Appeals Panel has found that an injury caused from physical therapy could be a compensable injury. See Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992. In that case a doctor gave written orders for therapy for claimant's arm for nine weeks, during which time the therapy injured her hip and back, while claimant was being "manipulated." Similarly, in Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993, a work-hardening program was prescribed in February 1992 for a neck injury that had occurred (date of injury). Injury occurred during work hardening while under the supervision of a physical therapist. The treatment was said to meet the definition of Section 408.021. A concurring opinion said:

This decision should not be construed as standing for the proposition that any post injury physical activity by a claimant even under the general auspices of a health care provider, no matter how attenuated from the original injury, will qualify as being "proper or necessary treatment" flowing from the original injury.

Another injury was found to be compensable due to medical treatment of the original injury when surgery was performed for a compensable back injury and a heart attack immediately thereafter caused death. See Texas Workers' Compensation Commission Appeal No. 92540, decided November 19, 1992.

In contrast, in Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992, a fall at home after the initial injury, while doing "suggested" exercise, walking, was not found compensable; it was affirmed as not an injury that "naturally" flowed from the original injury, and it also was said not to result from medical treatment. Another case, Texas Workers' Compensation Commission Appeal No. 93574, decided August 24, 1993, illustrated the sense of the Appeals Panel that the injury must be found as a result of the prescribed physical therapy. There, swimming was prescribed, but the claimant was injured in the shower at the swimming facility, not during prescribed physical therapy. The decision at hearing that the subsequent injury was compensable was reversed.

The hearing officer states that she distinguishes the case under review from Texas Workers' Compensation Commission Appeal No. 950524, decided May 19, 1995. In that case a claimant testified that, after his compensable knee injury, he fell at home while mowing after his doctor had told him he "needed more physical therapy . . . start doing activity." The hearing officer found the subsequent injury compensable, but Appeal No. 950524 reversed and rendered that the subsequent injury was not compensable. The opinion in Appeal No. 950524 distinguished that case from the compensable injury cases involving medical care, such as physical therapy, from which another injury occurred.

At best, we can only find that Dr. S, in June 1994, instructed claimant as to a continuous manner of living that would help him to function satisfactorily with the results of the injury he had sustained. That instruction included the maintenance of a walking program and adherence to instructions in a "back booklet" in conducting his activities. This instruction was open ended, without any time limit. Under it, a fall could also occur when claimant was performing a walking regimen a year, or several years, from now.

The hearing officer recognized that this issue falls into a questionable area under the decisions set forth previously by the Appeals Panel. In reversing this case, we do not mean to imply that medical care does not continue after MMI. Certification of MMI is but one event here that was considered. We have pointed out in Texas Workers' Compensation Commission Appeal No. 941243, decided October 26, 1994, that even surgery may be performed after MMI has been reached. In this case, we are presented with a claimant, who is not just at MMI, but was discharged by his doctor to only return as the claimant needed. There was over one year elapsed since surgery was performed for the compensable injury. A doctor, who had shown knowledge of physical therapy by his earlier prescriptions of such, did not attach any of the

identifiable qualities of physical therapy to claimant's walking "program." As the quote in Appeal No. 93861, *supra*, indicated, a compensable injury does not result from every post-injury physical activity, without regard to time, ongoing medical care, or supervision of the activity.

The finding of fact that the injury sustained in _____ was a result of "physical therapy prescribed" to treat claimant's injury of _____ is against the great weight and preponderance of the evidence.

We reverse the decision that claimant's neck injury was compensable and render that claimant's neck condition was not a compensable injury.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge