

APPEAL NO. 991636

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 8, 1999. She (hearing officer) determined that the respondent's (claimant) compensable injury of _____, extended to a right shoulder injury. The appellant (self-insured) appeals this determination, asserting legal error. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The essential facts of this case are undisputed. The claimant, a school teacher, sustained compensable knee and low back injuries in a fall on _____. On Thursday, January 21, 1999, she underwent a diskectomy at L5-S1. The next day she was discharged from the hospital and went home. The postoperative instructions included bed rest for a week and she was also advised to move her body as a unit because uneven twisting could result in further injury. In evidence were written general instructions that included: "Do not twist your back, always move your body as a unit (when in bed and when standing)." This procedure was described as a "log roll." Because she became very uncomfortable lying on her back and had no back muscle strength, she used her right hand to reach and hold the bed headboard and pull herself over onto her side. Apparently she had been doing this for several days after her return home and contends that on Monday, January 25, 1999, she could not raise her arm, lost range of motion in the arm, and had pain. She further testified that she saw little of her surgeon, Dr. G, and first reported her shoulder condition to Dr. K, her treating doctor, at her next scheduled appointment with him on April 8, 1999. Dr. K diagnosed right shoulder impingement syndrome, which the claimant contends is part of her compensable injury of _____. In a letter of May 4, 1999, Dr. K stated his belief that the claimant's right shoulder impingement syndrome "is directly related to her recent lumbar surgery. Due to severe deconditioning in the lumbar spine, she had to rely heavily on the upper body to turn in bed. This caused right shoulder impingement syndrome. . . ." In a letter of June 10, 1999, Dr. K wrote that the claimant "specifically followed" her discharge instructions to move her body as a unit when she injured her right shoulder.

The self-insured appeals the following findings of fact and conclusion of law:

FINDINGS OF FACT

3. The instructions given to Claimant following her spinal surgery regarding the need for her to turn her body as a whole unit and not to twist her back constituted treatment as they promoted her recovery from the compensable injury.
4. Claimant injured her right shoulder by following the instructions of her surgeon and using her right arm to turn her body as a whole unit during her initial recovery period.
5. The injury to Claimant's right shoulder was an injury which flowed naturally from the compensable injury and treatment therefore.

CONCLUSION OF LAW

3. Claimant's _____ compensable injury extends to an injury to her right shoulder.

The self-insured does not dispute the sufficiency of the evidence to support these factual determinations, but argues error as a matter of law for two reasons. First, it asserts that the shoulder injury did not occur during medical care because it occurred at home and "not during actual medical care, such as physical therapy where the injury would be compensable." Second, it argues that the claimant did not prove through expert medical evidence that the right shoulder injury was caused by her following postoperative instructions.

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." In its first point of error, the self-insured relies primarily on our decision in Texas Workers' Compensation Commission Appeal No. 951544, decided October 26, 1995, for the proposition that for medical treatment to be a cause of an extension of a compensable injury the medical treatment must be prescribed and tailored for the specific injured worker and does not include "general, non personalized instructions or prescriptions for exercises."

While this distinction is not without some basis in our prior decisions (see, e.g., Texas Workers' Compensation Commission Appeal No. 93574, decided August 24, 1993, where swimming was prescribed and the later injury occurred while taking a shower after swimming, and Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992, where general walking suggested by the treating doctor caused an injury), we cannot agree that the claimed shoulder injury in this case happened during activities tantamount to physical therapy or suggested exercises. Rather, it occurred while

the claimant was attempting to comply with postoperative instructions. And even though the postoperative instructions were general in the sense of applying to all spinal surgery patients, we cannot conclude that this made them in some meaningful way not particularized to this claimant. Indeed, one can legitimately question why the instructions would be different for any other "normal" spinal surgery recovery.¹ Nor are we willing to conclude that reaching for the headboard in order to turn her body "as a unit" was contrary to these instructions. For these reasons, and given the proximity in time between the surgery and the claimed shoulder injury, we find no error of law in the findings of the hearing officer that the postoperative instruction constituted medical treatment for the compensable injury and that the right shoulder injury was caused by following these instructions.

In its second point of error, the self-insured described the claimant's position as being that she injured her shoulder because "she was in such a 'weakened position' that she was unable to move her body normally." It then argues that the claimant failed to provide sufficient expert evidence that the shoulder injury naturally flowed from this weakened condition and quotes the following proposition of law from Texas Workers' Compensation Commission Appeal No. 94557, decided July 21, 1994:

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.

Initially, most obvious about this quotation is its reference to an injury "well into the future." In the case we now consider, the temporal proximity of the surgery and the claimed follow-on or "naturally resulting injury" was less than five days. In Texas Workers' Compensation Commission Appeal No. 972079, decided November 20, 1997, we affirmed a finding that a right leg fracture in a fall on (date of subsequent injury), caused when a right knee compensably injured on (date of initial injury), locked up, was a natural result of the original injury. Similarly, in Texas Workers' Compensation Commission Appeal No. 951108, decided August 23, 1995, we affirmed a finding of a compensable right arm follow-on injury in a fall at home some six days after the original injury left leg fracture. Significant to the outcome of these cases was the short time between the injuries. See *also* Texas Workers' Compensation Commission Appeal No. 950524, decided May 19, 1995. Thus, while Appeal No. 94557, *supra*, refers to medical evidence, it is clearly in the context of a lengthy period of elapsed time between the initial and subsequent injury. In any case, we believe Dr. K's opinion, quoted above and found credible and persuasive by the hearing officer,

¹There was no evidence that the spinal surgery in this case was other than "normal."

constitutes expert evidence to a reasonable degree of medical probability² that the shoulder injury naturally resulted from the back injury and surgery. In the context of this appeal as raising a question of legal error and not factual insufficiency we are unwilling to conclude that Dr. K's statement was insufficient as a matter of law to support the challenged findings of fact and conclusion of law.³

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge

²Self-insured, in its appeal, appears to almost concede as much by describing Dr. K's statement as "slightly more direct, but still insufficient" because it did not expressly analyze the claimant's so-called "weakened condition."

³Regardless of the questions raised about the adequacy of Dr. K's opinion, one can question whether this case is properly analyzed as a "weakened condition" case rather than as an "altered use" case. The latter, typically involving an altered gait, refers to claims that an injury to one body part causes an alteration in the use of another body part to compensate for the functional limitations imposed by the injury. See, e.g., Texas Workers' Compensation Commission Appeal No. 960654, decided May 16, 1996. In some cases, the connection between the two injuries is too tenuous to support a "naturally resulting" conclusion and in other cases it is not. This factual determination is for the hearing officer to make. Because this case was not contested or decided on this basis and because the appeal raised only errors of law, we do not further address the question.