

APPEAL NO. 062634
FILED MARCH 1, 2007

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 November 20, 2006. The hearing officer decided that the appellant (claimant) did not sustain a compensable injury on _____, and that the claimant, by definition, has sustained no disability. The claimant appealed, disputing both the compensable injury and disability determinations. The respondent (self-insured) responded, urging affirmance.

DECISION

Reversed and rendered in part and reversed and remanded in part.

FACTUAL SUMMARY

It is undisputed that the claimant, a 10-year employee, worked as a solid waste equipment operator II or a trash collector. His duties included collecting yard waste and/or curbside recycling by hand from residences at the curb on predetermined routes. Medical evidence indicates that the claimant suffers from preexisting conditions of severe pes planus or flatfoot and equines-tight Achilles tendon. The claimant testified that his doctor recommended that he wear steel-toed, lace-up work boots and an ankle brace while working because of prior injuries to his left ankle. The claimant testified that on _____, while collecting waste and while wearing his protective footwear, he stepped down the truck cab steps to the ground, putting weight on his lower extremities and injuring his left ankle. The evidence is conflicting as to whether the left ankle "gave out" and collapsed or whether the claimant twisted and rolled his ankle at the time of injury. The self-insured's notice of denial of compensability states that it is the self-insured's position that the claimant's current medical condition is related to a preexisting condition and is not associated with a work injury. In her background discussion, the hearing officer indicated that the claimant did appear to have sustained an incapacitating [left] ankle injury on _____, when he stepped down from his work vehicle during his normal shift.

The claimant testified that he was performing his regular work duties at the time of the incident and the medical record of the claimant's initial _____, evaluation and treatment with Dr. D indicates a left ankle sprain. The claimant subsequently selected Dr. C as his treating doctor. Dr. C's medical records noted the claimant's initial January 13, 2006, visit for his left ankle pain. The history noted that the "P[atien]t states he injured it [left ankle] 9 months ago and it got better but reinjured it last month."¹ Dr. C assessed and began treating "Foot Flat Pes Planus – Severe" and "Tendonitis Tibialis Tendon – Severe." A March 1, 2006, Magnetic Resonance Imaging (MRI) of the left

¹ There is a Work Status Report (DWC-73) signed by Dr. D regarding a April 20, 2005, ankle sprain, indicating that the sprain was resolved and the claimant was released to return to work without restrictions as of May 28, 2005.

ankle concluded a suspected remote anterior talofibular ligament sprain, pes planus, and no evidence for acute abnormality. Dr. C, in a Medical Release/Physician's Statement, dated October 2, 2006, indicated that the preexisting conditions of the claimant are "[f]lat [f]eet deformities (severe) & equines-tight Achil[les] tendo[n]" and the injuries that occurred on _____, were "[left] ankle sprain – possible abduction injury." In response to an inquiry if the claimed December 2005 injury worsened any of the preexisting conditions, Dr. C stated that the patient developed "posterior tibial tendonitis & pain also with FHL, FDL tendonitis, severe weakness."

There was testimony by the claimant that he was off work for periods of time; that he received short term disability benefits; that he worked light duty until he was terminated by his employer; and that he subsequently worked part-time for a different employer. The hearing officer specifically found that the claimant has been unable to obtain and retain employment at wages equivalent to the wage he earned prior to _____. However, the hearing officer failed to find a period or periods of disability because she found that such inability to obtain and retain employment at wages equivalent to the preinjury wage was not the result of an injury for which workers' compensation benefits are payable.

COMPENSABILITY

Section 401.011(10) provides that a "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under the 1989 Act. Section 401.011(12) provides in pertinent part that "course and scope of employment" means 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, and that the term includes an activity conducted on the premises of the employer or at other locations. See Appeals Panel Decision (APD) 051610-s, decided August 26, 2005.

In her background discussion, the hearing officer indicates that:

"[i]f, as Claimant testified, his ankle rolled or twisted to cause the claim[ed] injury, then the injury is compensable. However, the evidence instead indicates that Claimant's preexisting ankle infirmity merely caused it to collapse as he stepped down from his truck, and that the incident in question therefore is properly considered an idiopathic fall. Since the incident caused by Claimant's ankle weakness did not result in an injury to any anatomical structure other than his ankle, applicable precedent dictates that Claimant's alleged ankle injury of _____ is not compensable."

According to Finding of Fact No. 6, the hearing officer found that the claimant did not sustain damage or harm to the physical structure of his body while he was engaged in the exercise of his job duties with the employer. We disagree. The claimant was

performing an activity that had to do with and originated in the business of his employer and he was performing that activity furthering the business of his employer when the claimed injury occurred. The pivotal question of the instant case involves causation or whether the injury arose from the employment. The claimant's left ankle injury arose out of his employment because it was sustained as a result of a risk or hazard necessarily or ordinarily or reasonably inherent in or incident to the conduct of his work as a trash collector descending the truck cab steps, putting weight on his lower extremities, to perform his work duties. See Lumberman's Reciprocal Ass'n. v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922).

The hearing officer improperly applied the law to the facts of this case in her analysis of compensability and idiopathic falls.² The facts of this case do not indicate an idiopathic (of unknown cause) condition or fall. The instant case is factually similar to the situation in APD 992086, decided October 28, 1999, in which the claimant was found to have sustained a compensable injury when she pushed her chair back at her work station, stood up, and felt a pain in her low back and down her legs. The Appeals Panel held that the activity was clearly part of her job and furthered the affairs of the employer and that whether the claimant was twisting, turning, or performing any untoward body motion is not determinative of whether the injury is compensable. In APD 012582, decided December 10, 2001, the claimant was exiting from her employer's building, stepped over water at the doorway, and heard her knee pop. There was a claimed knee injury. In evidence was an MRI indicating a degenerative condition in the knee. The Appeals Panel reversed the hearing officer's decision that the claimant did not sustain a compensable injury. The hearing officer apparently believed that the claimed injury was an idiopathic injury, but the Appeals Panel stated that the mechanics of the injury were plausible and explained by the claimant's testimony and the injury was not idiopathic or of unknown cause.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. See Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ). The employer accepts the employee as he is when he enters employment. It is no defense to a claim for compensation that the injury would not have been as great if the employee had been in a healthy or more perfect physical condition. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is a preexisting infirmity where no injury might result to a sound employee, and a predisposing bodily infirmity will not preclude compensation. See APD 040735, decided May 25, 2004.

Accordingly, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury and render a new decision that the claimant did sustain a compensable injury on _____.

DISABILITY

² See APD 051610-s, *supra*, for a discussion of cases on idiopathic falls resulting in compensable injuries.

Section 401.011(16) defines “disability” as “the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.” The disputed issue of disability is a question of fact to be determined by the hearing officer. APD 011968, decided September 19, 2001. The claimant has the burden to prove disability as defined by Section 401.011(16). APD 93953, decided December 7, 1993. A claimant may have intermittent periods of disability. APD 012689, decided December 20, 2001. Periods of disability should include specific beginning and ending dates. APD 061390, decided September 6, 2006. There is sufficient evidence in the record to support the hearing officer’s determination that the claimant has been unable to obtain and retain employment at wages equivalent to the wage he earned prior to _____. In Finding of Fact No. 7 and Conclusion of Law No. 4, the hearing officer determined that the claimant did not sustain disability because there was no compensable injury. Since the hearing officer’s determination that the claimant did not sustain a compensable injury has been reversed and a new decision rendered that the claimant sustained a compensable injury, we also reverse the hearing officer’s determination that the claimant did not have disability and remand the issue of disability back to the hearing officer to make a determination supported by the evidence as to the period or periods of disability as defined by Section 401.011(16). No additional evidence is required. The hearing officer at her discretion may allow additional oral or written comment on the remanded issue regarding the dates of disability.

SUMMARY

We reverse the hearing officer’s decision that the claimant did not sustain a compensable injury on _____, and render a new decision that the claimant did sustain a compensable injury on _____. We reverse the hearing officer’s decision that the claimant, by definition, has sustained no disability and remand back to the hearing officer to determine the period or periods of disability as defined by Section 401.011(16).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers’ Compensation, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**TC
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge