APPEAL NO. 91038
FILED NOVEMBER 14, 1991

On September 4 and 5, 1991, a contested case hearing was held. The hearing officer determined that the appellant (claimant below) did not sustain a compensable injury under the Texas Workers' Compensation Act (TEX. REV. CIV. STAT. ANN., art. 8308-1.01 et seq) (1989 Act), and denied all income and medical benefits. The appellant urges us to reverse because of the hearing officer's error in one of his findings and conclusions, his incorrect statement of the case and in his omission of undisputed testimony in the statement of evidence.

DECISION

Finding merit in the appellant's contentions, we reverse the hearing officer's decision and render a new one in its place.

The appellant worked for employer who carried workers' compensation coverage with the respondent. On _____, the appellant was driving a three-wheeler tow truck, referred to as a "mule," when the gears locked causing it to stop suddenly. Because of its construction, a driver stands while driving a mule. When the mule stopped suddenly, the appellant was thrown forward bending his knee, pushing it against the metal frame and causing the knee to "pop." Several co-workers saw the incident and asked if the appellant was hurt and suggested he go to the dispensary. The appellant stated his knee was hurting but thought it would be okay.

According to the appellant, he told a supervisor, BD, that he had hurt his knee and that he subsequently went back to work. He did not miss any time off work for the next several weeks although he states his knee continued to "pop" and it had swollen. Nonetheless, he practiced basketball twice on an off-duty company team in preparation for a game against another local company. He stated that at the practices he wore a knee brace but the knee kept swelling and got worse. On the evening of the game he did not think he could play because of his knee but was encouraged to try by some team members. He put on two knee braces and he played for a few minutes although the knee was bothering him. He was taken out of the game but denies that it was because he injured the knee in the game. He also denies telling anyone he injured his knee in the game.

Several days later he left work early because the knee was bothering him. He subsequently went to the dispensary and finally to a specialist who performed arthroscopic surgery on the knee. He also filled out a written report of injury dated March 13, 1991 indicating he hurt his knee and back driving the tow truck.

The appellant indicated he had filed a claim for an injury to this same knee in 1980 and that it had been injured in 1985 without any claim being filed. He stated he had no

trouble with the knee from 1985 until the date of the incident, _____. He did not report this particular injury in writing until March 13 because he thought the knee might get better by itself and only after it became worse did he formally file a notice of injury.

Two of the appellant's co-workers testified that they had observed the incident close up (within several feet) and saw the mule stop suddenly and throw the appellant forward striking his knee on the battery. The appellant got off the vehicle and was hobbling around and was "hurting." Both of the co-workers advised the appellant to go to the dispensary because they thought the appellant had cracked the knee bone and knew that he was hurt pretty bad. Neither of these co-workers knew anything about the appellant's playing basketball.

One of the members of the company basketball team testified that the appellant came to practice with a knee brace on and stated that he had hurt it at work on a truck. He testified that the appellant showed him the injured knee and that it was swollen. He also stated that the appellant did not come to every practice and that he was unaware of the appellant being injured at any practice session or at the subsequent basketball game. The appellant wore the knee brace at the basketball game.

The respondent called two witnesses. BD, an area manager, testified the appellant did not report any injury to him until March 13, 1991, when the appellant asked for a pass to go to the dispensary stating he had injured himself on one of the trucks. He denied the appellant ever told him about the injury or incident in February until March 13.

Mr. C, also an area manager, testified that on or about March 6, 1991, he talked to the appellant several times about the appellant's swollen knee which he, Mr. C, had observed. According to Mr. C, the appellant told him he hurt it several days earlier in a basketball game. The appellant told him that he didn't think it was bad enough to have anything done about it. The appellant later requested to leave work early. Mr. C put a statement in the accident investigation document (C/O Ex. 2) that the appellant told him on March 6, 1991 that he hurt his knee while playing basketball. Mr. C stated that sometime after March 6, the appellant told him about bumping his leg earlier and injuring it. Mr. C indicated this in the investigation report.

Mr. P, a member of the company basketball team, testified the appellant did not come to all the basketball practices because of his knee. He overheard a conversation between the appellant and the coach of the team wherein the appellant said the reason for the brace was because he hurt his knee at work. Mr. P testified he did not know of any new injury to the appellant's knee as a result of basketball. He knew the appellant's knee was hurting him because he was limping when he came off of the basketball floor. He assumed he reinjured it during the game but neither the appellant nor anyone else told him that nor did he see the appellant reinjure it. There was no doubt in his mind that something happened in the game to cause the leg to get worse.

The appellant urges that the hearing officer erred in his Finding of Fact Number 7 which provided that:

> The Claimant failed to prove that the incident of _____, caused an injury to his left knee.

A finding of fact by a hearing officer, should not be overturned unless it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). On appeal, in determining this sufficiency question, all evidence admitted must be considered and objectively discussed in sufficient detail to demonstrate the correct standards of review have been followed. Sells v. Texas Employers Insurance Ass'n. 794 S.W.2d 793 (Tex. Civ. App.-Tyler 1990, writ denied); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cropper v. Caterpillar, 754 S.W.2d 646 (Tex. 1988).

Reviewing the evidence admitted at the hearing and applying this rigorous standard, we are convinced that the hearing officer's finding cannot stand. The evidence in the record, contrary to the finding of a failure to prove a knee injury on _____, consists of the testimony of the appellant and several witnesses.

It was virtually uncontroverted that an accident occurred on _____ involving the appellant on a tow truck or mule. The appellant testified the sudden stopping of the truck caused him to be thrown forward resulting in his knee bending and striking the truck and "popping." He stated that over the next several days it continued to "pop" and was swollen, although he was able to continue to work. He practiced basketball twice with a company team and wore a knee brace but the knee got worse. He played in a game using two knee braces but it was bothering him so he was taken out after a couple of minutes.

Two co-workers, within several feet of appellant, observed the _____ accident and both testified the appellant was limping or hobbling around and was hurting. They felt he was hurt pretty bad and urged the appellant to go to the dispensary. The appellant stated he didn't go to the dispensary at the time as he thought the knee would heal itself.

One member of the basketball team stated the appellant came to basketball practice with a knee brace on and stated he injured his knee at work on a truck. He stated the appellant showed him his knee and it was swollen. Another member of the basketball team testified the appellant did not come to all the practice sessions because of his knee and that he overheard the appellant tell the coach he had injured his knee at work. This team member also testified he did not know of any new injury to the appellant's knee as a result of playing basketball.

There was conflicting evidence as to whether the appellant told his supervisor about the injury on the day it occurred; however, he did give notice of the injury within the 30 days required under the 1989 Act. (Article 8308-5.01). This notice occurred several days following the basketball game and after the appellant requested to leave early because his

knee was bothering him. One of the supervisors also testified that the appellant stated he hurt his knee in a basketball game. This was adamantly denied by the appellant.

As we understand the position of the respondent at the hearing, they were not contesting that the incident on _____ occurred or that the appellant bumped his knee. Indeed, respondent's counsel stated the evidence was overwhelming that the incident occurred. However, counsel urged that since there was no time lost following the _____ incident, there was no disability and, therefore this did not amount to a compensable injury.

Taken together, the evidence, in opposition to the finding of the hearing officer that an injury on _____ had not been proven, is so strong, uncontroverted, and convincing as to render his finding so against the great weight and preponderance of the evidence to be clearly wrong. (Sells, supra). The 1989 Act defines injury as "damage or harm to the physical structure of the body . . ." (Article 8308-1.03(27)). We believe the evidence in this situation comes within that definition.

This does not, however, end the inquiry in this case. Did the appellant sustain a compensable injury under the evidence and whose burden was it to prove lack of a compensable injury? Under the circumstances of this case, we hold that the respondent did not sustain its burden of showing that the eventual medical treatment and incapacitation flowing from the _____ injury was solely the result of a subsequent injury (related to basketball) and not a mere aggravation of the injury occurring on _____. Although the evidence may not establish that the injury occurring on _____ was realized to be a compensable injury at that time, but only became so when the knee became worse, this does not defeat the appellant's claim.

As previously indicated, the appellant did report the _____ injury within the 30-day statutory period. Although it is controverted as to whether he immediately told his supervisor about the knee injury, we find this to be, at most, of very limited probative value. The appellant stated that he did not think it was serious at the time but only as it became worse over the next couple of weeks. This is analogous to the situation of showing good cause for not timely filing a claim. It is . . . "well settled that a bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause." Texas Casualty Co. v. Crawford, 340 S.W.2d 100 (Tex. Civ. App.-Amarillo 1960, no writ). In Aetna Casualty & Surety Co. v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.), good cause was shown where a claimant, who believed her back injury was trivial and would not be disabling, failed to give notice within the 30-day period.

Having determined that the great weight and preponderance of the evidence clearly establishes an injury on _____, we turn to the compensability of the injury. It was not disputed that the appellant ultimately required medical attention for his knee and that arthroscopic surgery was performed on the knee. A question remains whether there was some other injury to the knee that was the sole cause of the appellant's eventual incapacitation. That this same knee had been previously injured does not preclude or

reduce (except as provided in Article 8308-4.30) workers' compensation benefits if ultimate incapacity is contributorily caused by an accident arising within the course and scope of employment. Texas Employers Insurance Ass'n. v. Page, 553 S.W.2d 98 (Tex. 1977). To defeat a claim for a current injury because of a pre-existing or subsequent injury, the burden is on the carrier to show that the pre-existing or subsequent injury is the sole cause of the present incapacity. Gonzalez v. Texas Employers Insurance Ass'n, 772 S.W.2d 145 (Tex. Civ. App.-Corpus Christi 1989, writ denied); Evan v. Casualty Reciprocal Exchange, 579 S.W.2d 353, (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.); Webb v. Western Casualty & Surety Co., 517 S.W.2d 529 (Tex. 1974). And, an injury may be compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition. Hardware Mutual Casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Guzman v. Maryland Casualty Co., 107 S.W.2d 356, (Tex. 1937).

The respondent did not present sufficient evidence to establish or show that a subsequent injury to the appellant's knee was the sole cause of his resulting compensable injury. The very most that the evidence shows is that the _____ injury became worse in the ensuing days and was likely aggravated by the appellant's activity in playing basketball. Under these circumstances, the appellant suffered a compensable injury within the course and scope of his employment and is entitled to benefits under the 1989 Act. The decision of the hearing officer is reversed. We render a new decision holding that the appellant incurred a compensable injury for which he is entitled to benefits under the 1989 Act.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge