APPEAL NO. 980631
FILED MAY 14, 1998

Following a contested case hearing held on February 10 and 23, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____, and that she had disability on _____, and from _____, through February 1, 1998, and the disability totaled 13.85 weeks during that period. The appellant (carrier) has appealed the injury issue, contending that claimant's having sustained a knee injury while merely walking down a hall at work was not a compensable injury in the absence of a showing of a workplace defect or a showing that walking was an essential part of her duties. The carrier appeals so much of the disability determination as finds that the total time of disability was 13.85 weeks and asserts that the period of disability totaled 10.85 weeks. The file does not contain a response from claimant.

DECISION

Reversed and Rendered.

As the hearing officer states in his decision, and as the carrier acknowledges in its request for review and stated in closing argument below, the essential facts in this case are not in dispute. Accordingly, we adopt the hearing officer's recitation of the evidence and will set out only such evidence as is necessary to our decision.

Claimant, employed as a hospital x-ray technician, testified that on _____, she left an x-ray room where she was performing mammograms to obtain an x-ray cassette from the x-ray department and, as she was walking down the hall, she turned a corner by the receptionist's desk and her right knee "popped" and gave way and she felt immediate, severe pain and went to a bathroom. She said there was no problem with the floor and that her shoe did not catch. She said that she had not had problems with that knee since 1994 when she was told by Dr. R that she had a loose body in the back of the knee. In her prior recorded statement of August 26, 1997, claimant said she did not know if she was just walking too fast down the hall because she was behind schedule. The carrier pointed out that in her prior recorded statement claimant said she "wasn't turning the corner or anything [but] was just walking straight and it popped," whereas, in her testimony claimant said she was turning a corner at the time. However, the carrier felt that the matter was irrelevant.

Fellow x-ray technician, Ms. N, testified that she was approximately 10 feet from claimant in the hall but not facing her when she heard a "pop," that she turned and saw claimant in pain, and that claimant said her kneecap popped out of place and she put it back and was in pain. Ms. N indicated that there was no problem with the hallway floor in the area where the incident occurred, that claimant was performing her normal duties at the time, that claimant did not indicate it happened as she turned a corner, and that x-ray technicians are not required to walk more than other hospital personnel or the general public.

Claimant testified that she was seen on _____, by Dr. R, an orthopedic surgeon and her treating doctor. Dr. R wrote the Texas Workers' Compensation Commission on September 3, 1997, stating that his diagnosis is that "at the time of the injury, which occurred at work, she had a deep subluxation of her patella that relocated spontaneously"; that claimant's past history is positive for knee problems occurring in high school while playing basketball; that since then, she has had no significant knee problems or abnormalities; that she did have an acute pain problem which he treated with anti-inflammatories; and that, in his opinion, her problem is not strictly due to an arthritic component in her knee but is the new onset of a patellar instability which occurred with her injury on _____. Dr. R further stated that claimant had been working significant hours and was trying to complete her work "when a quick turn caused the injury to occur," and that "a quick turn such as this can cause a myriad of problems in the knee. . . . " Neither claimant nor Ms. N testified to a "quick turn." Dr. R concluded that this is a problem which occurred while claimant was performing her duties, that it was an acute injury that led to the acute patellar femoral instability which was not preexisting but has since been persistent, and that claimant's preexisting patellar femoral arthritis is not what is causing her problem.

Claimant further testified that Dr. R took her off work on August 20, 1997, because of severe knee pain; that she commenced working part-time on September 22, 1997, and worked for several months at four hours per day and then six; that her knee pain increased in December 1997 and she was taken off work for two weeks on December 16, 1997; that she returned to work part time again on January 5, 1998; and that she was authorized to return to work full time effective February 2, 1998. Claimant further testified that on February 1, 1998, she was injured in an accident unrelated to her employment and has since been unable to return to work due to those injuries.

The carrier introduced, through the testimony of the employer's human resources manager, Ms. J, claimant's time records for the pertinent period and claimant indicated she had no disagreement with those records. Ms. J stated that she determined, based on those records, that claimant missed 554.10 hours of work from after _____, to the hearing date, February 23, 1998, that this period of time amounted to 13.85 weeks, and that up to February 1, 1998, the date claimant had the other injury, 10.85 weeks. Claimant stated that she was only claiming disability through February 1, 1998. The hearing officer states that the parties agreed that claimant missed a total of 554.10 hours of work due to her knee injury and that those hours convert to 13.85 weeks. In Finding of Fact No. 8, Conclusion of Law No. 4, and in the decision, the hearing officer states that claimant had disability on _____, and from that date through February 1, 1998, and that the disability periods totaled 13.85 weeks. It is clear from the evidence that the correct figure is 10.85 weeks, as claimant herself asserted. Accordingly, we reform the finding and conclusion and decision to reflect that the total period of disability is 10.85 weeks.

The hearing officer found that claimant was walking down the hallway from the x-ray room to obtain additional cassettes and her knee popped and gave way, causing pain; that her walking from the x-ray room to the area where the cassettes were stored was an activity within the course and scope of her employment; and that at the time of this injury, claimant was engaged in an activity which furthered the affairs of her employer. The hearing officer did not find that claimant's knee popped while turning a corner, hurriedly or otherwise. The carrier has not directly challenged these findings but maintains, as it did below, that claimant's injury was not an injury in the course and scope of employment because it occurred while claimant was merely walking, because there was no evidence of any defect on the floor, because claimant was at no greater risk of such an injury occurring at work as anywhere else, and because the injury was of a type to which the public at large is exposed. The carrier cited three Appeals Panel decisions for the proposition that injuries such as claimant's are not compensable, namely, Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993 (knee injury); Texas Workers' Compensation Commission Appeal No. 951129, decided August 22, 1995 (feet injury, reviews the standing and walking cases); and Texas Workers' Compensation Commission Appeal No. 951630, decided November 15, 1995 (standing, lifting, squatting).

Claimant argued that those cases are distinguishable because they involved occupational disease injuries (repetitive trauma), as distinguished from her discrete, accidental injury which happened at a specific time and place, and that the exclusion of ordinary diseases of life from the definition of injury in the1989 Act applies to occupational disease injuries but not to a discrete, accidental injury such as she sustained. *See* Sections 401.011(26) and 401.011(34). Neither party cited a case involving an accidental injury sustained from walking. Claimant cited, as analogous, the decision in Texas Workers' Compensation Commission Appeal No. 950103, decided March 3, 1995. In that case, the Appeals Panel affirmed the decision of a hearing officer that the low back injury of the employee, who worked at a desk, sustained while he was in the process of sitting down in the chair at his desk to perform work, was compensable. The carrier contended, however, that "the analysis is the same," whether the injury be one of occupational disease or accidental injury at a specific time and place.

Claimant had the burden to prove by a preponderance of the evidence that she sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(12) defines "course and scope of employment" to mean 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. As noted, the definition of injury includes occupational disease and the definition of occupational disease, which includes repetitive trauma and excludes ordinary disease of life.

In Deatherage v. International Insurance Company, 615 S.W. 2d 181, 182 (Tex. 1981), the Texas Supreme Court stated that "as a general rule, a claimant must meet two

requirements: (1) the injury must have occurred while the employee was engaged in or about the furtherance of the employer's affairs or business; and (2) the claimant must show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business or profession. [Citations omitted.]" In Texas Employer's Insurance Association v. Prasek, 569 S.W.2d 545, 54? (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.), the court stated the following:

> In determining whether the injury originated out of claimant's employment, it is necessary to determine that there was a sufficient causal connection between the conditions under which his work was required to be performed and the resulting injury to him. Such an injury originates out of claimant's employment when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent or incident to the conduct of such work or business. [Citations omitted.] The fact that an employee is injured while at work or on the premises of the employer does not in and of itself make the injury compensable. [Citations omitted.]

In Appeal No. 950103, *supra,* the Appeals Panel rejected the contention that the hearing officer erred, as a matter of law, in finding that the back injury occurred in the course and scope of employment stating that such is ordinarily a question of fact and that "each case must be determined on its own peculiar facts [Citation omitted.]"; that those cases involving claims of injury from repetitive sitting and standing do not apply; and that the ordinary disease exception in the definition of occupational disease "does not apply to every work-related injury." The decision further stated that "we find no intent within the 1989 Act for every discrete activity within the work day to be subject to an analysis that it 'could have' happened on some other premises or during a non-work related action," and, that "[t]o the extent that carrier's argument presupposes that a workplace defect or specific negligence of the employer should be proven in order to prove a 'positional risk,' such argument flies in the face of Section 406.031 which provides that a carrier is liable for compensation for an injury 'without regard to fault or negligence' if 'the injury arises out of the course and scope of employment.'"

The hearing officer's discussion makes clear that he relied on this case, by analogy, and rejected the carrier's cases because they involved occupational disease (repetitive trauma) cases and the exclusion of ordinary diseases. The hearing officer apparently saw no distinction between an injury sustained in the act of getting into or out of an employee's chair and merely walking. Further, the hearing officer made no mention of the causative relationship between claimant's walking on the employer's premises and her apparently spontaneous, idiopathic knee cap dislocation.

The decision in Appeal No. 950103, *supra*, has been cited in several subsequent accidental back injury cases, but not in a recent case, and we briefly review those cases. The Appeals Panel affirmed a finding of injury in the course and scope in Texas Workers' Compensation Commission Appeal No. 952057, decided January 16, 1996. In that case,

the child care center employee testified that she injured her back when she twisted and bent over to talk to a small child and heard her back "pop" and felt piercing pain when she tried to straighten up. The carrier argued that merely twisting and bending over to talk to a child is an ordinary activity of life and that the employment exposed the employee to no great hazard than was present to the general public. Our decision stated that the same thing could be said for injuries from a slip and fall or an injury lifting an item not unduly heavy or bending over to perform a work-related function; that that is not the test in a specific incident injury but rather that analysis applies in the occupational disease (repetitive trauma) cases; that "if there is damage or harm to the physical structure of the body and it arises out of and in the course and scope of employment it is generally a compensable injury"; and that "it is the fact that an injury occurs while performing a work-related function that is controlling and not that an injury might not have been sustained by someone else performing the same function or that one might confront a similar situation elsewhere." It is apparent that an employee of a child care center will be required to stoop and bend and twist in order to care for small children, thus such an injury can be seen to arise out of the employment and causation is shown.

In Texas Workers' Compensation Commission Appeal No. 970100, decided February 28, 1997, the Appeals Panel reversed on a matter of law and remanded for a new decision in a case where the employee, who had a desk job, testified that as she was getting out of her chair to go to a "fax" machine, she twisted her back and felt a sharp pain and the hearing officer determined that she did not have a compensable back injury because she had an ordinary disease of life. The Appeals Panel noted that the employee was quite specifically alleging a discrete injury at a specific time, date, and place and said it viewed the case as similar to the cases in Appeal No. 950103, *supra,* and Appeal No. 952057, *supra*. That decision also discussed Texas Workers' Compensation Commission Appeal No. 951076, decided August 18, 1995, a case involving a PBX operator who said she felt an "electrical shock" in her face when someone came up behind her to ask her a question and she turned her head and she was later diagnosed with a herniated cervical disc. The hearing officer determined that she was not injured in the course and scope of employment. The Appeals Panel was able to affirm on other grounds after disapproving a finding that the employee's activities, which furthered the employer's business, constituted nothing which was not inherent in daily life or in employment generally. Our opinion stated that while there was no argument that the employee's injury was one of repetitive trauma, "nevertheless there are cases of injury on the job in which an issue is raised as to whether the risk presented is personal to the claimant, or idiopathic," citing Texas Workers' Compensation Commission Appeal No. 941056, decided September 21, 1994, which is discussed below.

In Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, the hearing officer determined that the employee sustained a compensable back injury. The employee testified that she had been typing, rolled her chair back from her desk, attempted to stand up out of her chair, and felt excruciating pain. The Appeals Panel reversed and rendered a new decision that the injury did not occur in the course and scope of employment. The decision, which did not refer to Appeal No. 950103, *supra*, stated that "[s]tanding up without more, from sitting in a chair, is the type of activity that is a normal occurrence without regard to the work situation and has nothing to do with furthering the business of the employer." The decision also stated that "[t]here is not an 'ordinary disease of life' or similar statutory exception for injuries involving specific instances of trauma but, in those cases, employees must still prove that the alleged injury resulted from an activity originating in her work. Section 401.011(12)." The decision analogized the case to the case we discussed in Appeal No. 941056, *supra,* which involved a sneeze and an injured back, and said that the employee failed to prove that her injury resulted from the employer placing her in harm's way and factually distinguished the case from Texas Workers' Compensation Commission Appeal No. 971671, decided October 10, 1997. In the latter case, the Appeals Panel affirmed a hearing officer's decision that the employee's back injury was sustained as a result of work activities which included getting up from a chair and feeling a sharp low back pain.

In Texas Workers' Compensation Commission Appeal No. 980280 (unpublished), decided March 30, 1998, the Appeals Panel affirmed the hearing officer's determination

that the employee sustained a compensable back injury (though noting that a contrary inference could be drawn). The employee felt pain in her left side above the hip when she bent over in her chair to pick up a pencil and was later found to have a back strain.

In Appeal No. 941056, *supra,* the parties stipulated that the employee was driving a forklift at work when he sneezed and his back began to hurt and the hearing officer determined that the employee sustained a compensable back injury. The Appeals Panel reversed and rendered a decision to the contrary. The hearing officer had analogized the case to those involving idiopathic falls at work. The Appeals Panel found that analogy apt, reviewed the Texas case law and certain Appeals Panel decisions on falls at work, and stated that these cases reveal that injuries associated with such falls involved some instrumentality of the employer such as contact with a floor or parking lot surface. Our decision then stated:

> In the case we consider, however, there was no evidence that any instrumentality of the employer was involved, or that the employment exposed claimant to any particular hazard or otherwise made any contribution to claimant's back injury. Claimant did not contend that his apparently spontaneous sneeze was caused by any factor in his work environment. Nor did he contend that he fell from the forklift or was jarred by the forklift or that he struck his back or any other body part on the forklift when he sneezed. All the evidence established was that claimant simply sneezed at the workplace and the sneeze resulted in his back injury. *Compare* Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), where the employee, who was bending, stooping or squatting to paint a tank and who turned around when someone spoke to him and injured his back, was found to have sustained a compensable injury. The court's opinion stated: "It is held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable. [Citation omitted.] In our opinion, the reason for plaintiff's turning and the turn were incidents of his employment." *Id* at 905-906.

The decision in Appeal No. 941056 went on to say that "the failure of the evidence to establish any nexus between claimant's employment and his back injury, other than merely sneezing at the work place, requires that we reverse the decision and render a decision that claimant did not sustain a compensable injury." We also likened the case to that of Employers' Casualty Company v. Bratcher, 823 S.W. 2d 719 (Tex. App.-El Paso 1992, writ denied), where the court reversed and rendered a decision that, under the "positional risk" test, the deceased employee's rupture of an aneurysm while using the bathroom at work was not compensable. The court reasoned that the injury did not arise "but for" the employee being at work, that the injury was "due to a personal defect which proved to be fatal from a strain totally unrelated to the deceased's employment," and that the risk was

one the employee "would have confronted irrespective of any type of employment." *Id* at 722.

We distinguish our back injury decisions in Appeals No. 950103, 970100, and 980280, *supra,* in that those cases involved employees' sitting down in a chair or getting up from a chair or bending over in a chair, an instrumentality in the workplace, and we distinguish the decision in Appeal No. 952057, *supra*, in that it involved the employee's twisting and bending to talk to a small child and thus perform her work. These particular activities can be seen to raise out of the employment and be a risk incident to the employment. As for Appeal No. 972235, *supra*, it is consistent with the decision in this case if not altogether consistent with the aforementioned back injury from chair cases.

In the case we consider, there was no evidence of any instrumentality of the workplace involved in claimant's injury nor was there evidence of twisting, turning, or bending or other untoward body motion while claimant was walking down the hall. The evidence showed that claimant was simply walking down the hall when her knee popped and she experienced severe pain. There was no nexus to the employment other than the fact that the incident occurred on the employer's premises and we do not regard injury from any and all types of body motion on an employer's premises to be, *per se,* caused by the employment. In our view, the hearing officer's determination that claimant sustained a knee injury in the course and scope of her employment is against the great weight and preponderance of the evidence (In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)) because the evidence failed to establish the requisite causation which must be shown for all compensable injuries be they discreet accidental injuries or occupational disease injuries.

Since a compensable injury is a prerequisite to disability (Section 401.011(16)), we necessarily render a decision that claimant did not have disability.

The decision and order of the hearing officer is reversed and a new decision is rendered that claimant did not sustain a compensable injury on _____, and that she did not have disability from a compensable injury of that date.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

DISSENTING OPINION:

With all respect to my colleagues in the majority, I must dissent as I discern nothing compelling us to reverse the decision of the hearing officer, and believe that the basis stated by the majority will only serve to confuse some of the basic tenets of Texas workers' compensation jurisprudence. My first initial concern is whether the majority is confining itself to the appeal in deciding this case. The carrier appeals, essentially on the theory that the claimant's alleged injury is merely an ordinary disease of life. The majority explicitly, and correctly, rejects this argument as not being applicable to a situation where an injury is claimed as the result of a specific incident and, thus, a defense based upon an ordinary disease of life is clearly misplaced. Having rejected the basis of the carrier's appeal, I question whether we need to delve any further and believe, at that point, we could have simply affirmed the decision of the hearing officer.

The majority chooses to reverse and render the decision of the hearing officer based upon its view that the claimant failed to prove an insufficient "nexus" between her injury and her work, in that she failed to prove that her injury arose out of the work. This view of causality both confuses and troubles me. Certainly, the claimant must prove some causal connection between the work and her injury. In the present case, she testified that the injury to her knee took place while she was walking to obtain an x-ray cassette. Clearly, doing so was part of her job and furthered the affairs of her employer. The fact that he knee "popped" while she was doing this is confirmed not only by her testimony, but that of a coworker. There is medical evidence from Dr. R relating her injury to her work. Based upon the foregoing evidence, the hearing officer found that the claimant suffered an injury in the course and scope of her employment. In my mind, the hearing officer found causality based on sufficient evidence.

I find the majority's theory of causality doctrine troubling for a number of reasons. First, it appears to me to add an element of negligence law to workers' compensation liability, which has been traditionally based upon strict liability. I know of nothing that requires that a worker come into physical contact with some "instrumentality" of the employer to bring an injury withing the ambit of course and scope. In fact, any injury due to the motion of the body itself would, arguably, not be covered if such were the case, and this runs contrary to any number of previous cases. In fact, the very cases concerning injury getting in and out of chairs, which the majority seeks to distinguish, are injuries due to the motion of the body itself. In these cases, there was no indication that the chairs were a causal factor in the injury, but merely that they were physically proximate to the worker who was injured by moving the worker's own body. Second, I see no reason to distinguish between body movements that involve bending or twisting from the body movements involved in ambulation. It is incongruous to me that we would say that if the claimant's knee made a circular motion (twisting), she is in the course and scope of employment, while if it makes a backward and forward motion (walking), she is outside the course and scope of employment. In either instance, whether there is sufficient evidence to show an injury is a question of fact for the hearing officer, and I find no basis to make a distinction as a matter of law between the two mechanisms. Third, it appears to me that the majority's theory of causality runs counter to the modern development of the workers' compensation law which generally is broadly[1] construed to provide coverage. If any injury which is arguably "idiopathic" may, as a result, not be compensable, then many injuries could possibly be found to not be compensable. If, today, we extend the "idiopathic" fall cases to walking, why not extend them to bending or lifting? In my mind, the sole cause defense and the positional risk test, neither of which the carrier in the present relied upon in its defense or presented sufficient evidence to support, provide sufficient protection from making workers' compensation coverage absolute. To create a new doctrine by either analogy or out of whole cloth to provide a defense which this carrier never even propounded seems to me to be misguided. To propound such a doctrine without clearly spelling out its limits, I believe, will only sow confusion as to the meaning of what constitutes the course and scope of employment, leading to increased litigation and decreased protection of injured workers. I can only hope that today's case constitutes a very limited retreat from the basic doctrine of strict liability in workers' compensation law

[1] I use the word "broadly" as opposed to the word "liberally," which has often been used by courts, to remove any political connotations.

which makes most injuries taking place on the work premises compensable. If not, I would at least hope that if the scope of workers' compensation liability is narrowed, the premiums changed to industry for this coverage are correspondingly reduced.

Gary L. Kilgore
Appeals Judge