APPEAL NO. 051610-s
FILED AUGUST 26, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 16, 2005. The disputed issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable injury on _____; and (2) whether the claimant has had disability. The hearing officer resolved the disputed issues by deciding that: (1) the claimant did not sustain a compensable injury on _____; and (2) the claimant does not have disability. The claimant appeals the hearing officer's determinations, contending that he did sustain a compensable injury and that he has had disability. The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

The claimant worked as a truck driver for the employer. The claimant's testimony, his accident report, an investigation report, and medical records provide information as to what occurred on _____. On that day, the claimant drove the employer's truck to the place of business of an employer's customer to pick up a load. He parked the truck in a parking lot and walked across the parking lot to talk to a security guard about being admitted into another parking lot. After talking to the security guard, the claimant was walking back to the truck when he fell, striking his body on the pavement of the parking lot. The claimant does not recall falling down. He recalls walking back across the parking lot and then waking up on the pavement. The claimant does not know why he fell down. The claimant said that such an event had never happened to him before or since. The claimant got up off the pavement and went to the truck. His face was bleeding and his right shoulder was sore, but he finished out the day. The next day, his right shoulder was hurting worse and he went to a hospital. The claimant's written injury report to his employer reflects that he was injured while walking across the customer's parking lot; that the right side of his head and right shoulder were injured; that the injury occurred at 1:00 p.m.; that there were no witnesses to the accident; and that there were no contributing factors, such as rain or broken equipment, that contributed to the accident.

The hospital reports of (day after date of injury), reflect that the claimant complained of head pain and right shoulder pain, the onset of which was the previous day when he was walking across a parking lot and the next thing he knew he was on the ground with a head abrasion. The hospital reports state an emergency room assessment of an abrasion to the right side of the head and an abrasion to the right shoulder, and another hospital report provides a diagnosis of syncope. A required medical examination doctor examined the claimant in January 2005 and reported diagnoses of internal derangement of the right shoulder, a resolved closed head injury, and a cervical strain sprain, and noted that the claimant is unable to work because of

the marked restricted motion of his shoulder and neck. The claimant's treating doctor has reported that the claimant has right shoulder impingement and a partial rotator cuff tear and may need surgery.

The carrier's notice of denial of compensability states that it is the carrier's position that the cause of the fall is related to a preexisting condition and is not associated with a work injury. At the CCH, the carrier asserted that the claimant's injuries are not compensable because "this is a clear case of an idiopathic fall, that is, an unexplained fall," and that the Appeals Panel is "flat wrong" in its analysis of injuries involving idiopathic falls.

In the Background Information section of his decision, the hearing officer noted that on _____, the claimant, a truck driver for the employer, fell while crossing a customer's parking lot to obtain access to the customer's premises through a security guard; that the claimant's head and right shoulder were injured when the claimant hit the pavement; that the only explanation for the fall is a syncopal episode of unknown etiology; that there was no instrumentality of the workplace which caused the fall; that the claimant had no recollection of the incident except that he was walking across the parking lot and regained consciousness on the ground; and that there was no evidence of slipping, tripping, planting of a foot, a misstep or anything else other than ordinary walking.

The claimant appeals the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

4. The injuries sustained by Claimant on _____, while he was in the course and scope of employment for his employer were not a result of any instrumentality of the workplace in that Claimant fell as the result of a syncopal episode of unknown etiology.

CONCLUSIONS OF LAW

3. On _____, Claimant did not sustain a compensable injury.

4. Claimant does not have disability.

In requesting reversal of the hearing officer's decision, the claimant contends that there is no medical evidence that the claimant had a "syncopal episode" and that this is an "idiopathic fall."

There is an unappealed Finding of Fact No. 5 that if the injury of _____, were compensable, it would have caused the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage beginning (day after date of injury), and continuing through the date of the CCH.

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.

According to Finding of Fact No. 4, the hearing officer found that the claimant was in the course and scope of his employment when he sustained his injuries. He 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. The real question before us is one of causation, that is, whether the claimant's injury arose out of his employment. In Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922), the Texas Supreme Court stated that "an injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business." In Texas Workers' Compensation Insurance Fund v. Simon, 980 S.W.2d 730 (Tex. App.-San Antonio 1998, no pet.), the court noted that the parties had apparently agreed on appeal that the injury occurred in the course and scope of employment, but disagreed about whether the injury arose from the employment. The court stated that "the question under this prong of liability is whether the injury would have occurred if the 'conditions and obligations of employment had not placed the claimant in harm's way.'" The court noted that this was an issue of causation.

In Garcia v. Texas Indemnity Ins. Co., 146 Tex. 413, 209 S.W.2d 333 (1948), the employee was waiting to perform his work duty of lowering the gates to the employer's loading dock when he fell from the loading dock striking his head on a post and died. The court assumed for purposes of the appeal that the employee fell while in an epileptic fit. The court stated that the question before it was, since the employee's fall was due to his epilepsy, did his injury arise out of his employment? The court's inquiry was whether there was a causal connection between the conditions under which the employee's work was required to be performed and his resulting injury. The court held that the employee's injuries "arose out of his employment because it had 'causal connection with' his injuries, 'either though its activities, its conditions, or its environments.'" The court noted that the post was a condition attached to the employee's place of employment and that the post was an instrumentality essential to the work the employee was waiting to do. The court held that since the employee's fall resulted in an injury, which was in turn a producing cause of the employee's death, the employee's death was compensable, although the fall may have been due to a preexisting idiopathic condition.

In General Ins. Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), the employee, a janitor, started sweeping the restaurant where he worked and then went across the street to make a telephone call. When he returned

to the restaurant, he immediately fell down on the tile floor after entering the front door. The employee died four hours later from head injuries sustained in the fall to the tile floor. In affirming the trial court's judgment awarding death benefits to the employee's wife, the appellate court noted that the trial court had found that the employee suffered a dizzy spell and fell to the floor. The appellate court stated that the more reasonable interpretation of the evidence was that the fall is unexplained by any evidence in the record, but that for purposes of appeal would assume that the fall was caused by a dizzy spell. The appellate court stated that it could find no sound reason for denying a recovery where the fall is to the floor.

In American General Insurance Company v. Barrett, 300 S.W.2d 358 (Tex. Civ. App.-Texarkana 1957, writ ref'd n.r.e.), the employee was working for the employer on the premises of another company and he blacked out while walking down a hard-surfaced road to the clock-house to check out at quitting time. The employee fell backwards and fractured his skull and died four days later. In affirming the judgment of the trial court in favor of the employee's beneficiaries, the appellate court stated "[i]n the instant case it can be said the hard-surfaced road was an instrumentality essential to the work of the employer and falling against it was a hazard to which Barrett was exposed because of his employment and injury and death came to him because he was then working in the course of his employment."

In Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977), the Texas Supreme Court noted that an idiopathic fall is defined as a fall due to a diseased state of spontaneous origin which is neither sympathetic nor traumatic; that which is self-originated; of unknown causation. The court noted that in Garcia, *supra*, it had held that injuries may be compensable although the fall may have been due to a preexisting idiopathic condition. In Page, the employee was a bank security guard who had a preexisting right knee injury, his right knee buckled as he was crossing the employer's parking lot to return to the main bank building after opening the motorbank teller windows, and he fell, striking his right knee, wrist, and left arm on the parking lot surface. The trial court had granted an instructed verdict for the insurance carrier and the Court of Civil Appeals had reversed and remanded. The Texas Supreme Court affirmed the judgment of the Court of Civil Appeals remanding the case to the trial court, noting that a fall due to an idiopathic origin will not necessarily preclude recovery and that the evidence in the case presented a fact issue of whether the injury originated out of the employee's employment, that is, whether there was a sufficient causal connection between the conditions under which his work was required to be performed and his resulting injury. The court discussed the cases of Wickersham, *supra*, and Barrett, *supra*, and noted that it found no reversible error in those cases.

In Texas Workers' Compensation Commission Appeal No. 931083, decided January 10, 1994, the Appeals Panel affirmed a hearing officer's decision that the employee sustained a compensable injury where the employee fainted at work while making a telephone call about a fax, fell to the floor, and sustained injuries.

In Texas Workers' Compensation Commission Appeal No. 012124, decided October 23, 2001, the Appeals Panel affirmed a hearing officer's decision that the employee sustained a compensable injury where the employee was refueling a leased tank truck at an airport, lost consciousness, fell out of the truck cab to the ground, and sustained injuries. The Appeals Panel held that the hearing officer did not err in holding that the claimant sustained a compensable injury when he experienced his idiopathic fall. In addressing the carrier's argument that the accident did not arise out of the employment because no instrumentality of the employer was involved, the Appeals Panel noted that the definition of course and scope of employment in Section 401.011(12) provides for work performed either on the premises of the employer or at other locations and thus it was of no consequence that the claimant's employer may not have owned the truck, the refueling rack, or the tarmac.

In Texas Workers' Compensation Commission Appeal No. 992001, decided October 29, 1999, the Appeals Panel rendered a decision that the employee sustained a compensable injury where the employee's left foot folded over getting out of her car in her employer's parking lot and the employee fell and fractured her ankle. The Appeals Panel stated that the undisputed evidence was that the employee fractured her ankle as a result of her fall on and contact with the employer's parking lot and that the parking lot was an instrumentality of the employer.

In Texas Workers' Compensation Commission Appeal No. 042922-s, decided January 6, 2005, the Appeals Panel rendered a decision that the employee sustained a compensable injury where the employee lost consciousness in the employer's building, fell to the floor, and sustained injuries.

In Texas Workers' Compensation Commission Appeal No. 951576, decided November 9, 1995, the Appeals Panel affirmed a hearing officer's decision that the employee sustained a compensable injury when she passed out in the employer's cafeteria and struck her head on the carpeted floor, sustaining a head injury. In discussing the carrier's assertion that Wickersham, *supra*, and Barrett, *supra*, did not apply because the floor was carpeted, and not hard-surfaced, the Appeals Panel stated "A more likely rationale would be whether the surface on which the employee fell was sufficiently hard to cause the injury which ensued, since the injury must be caused by the instrumentality of the employer and not by the idiopathic or preexisting condition itself." We note that in requiring the injury in an idiopathic fall case to be caused by an instrumentality of the employer, such as the employer's cafeteria floor, Appeal No. 951576, did not consider a situation as is present in the instance case where the injury occurred away from the employer's premises while the claimant was in the course and scope of his employment while walking across the customer's parking lot.

In the instant case, the reason the claimant fell to the pavement is unknown, although he was diagnosed as having syncope the next day. Dorland's Illustrated Medical Dictionary, 28th Edition defines syncope as a temporary suspension of consciousness due to generalized cerebral ischemia; a faint or swoon. The hearing officer found that the claimant fell as the result of a syncopal episode of unknown

etilolgy. Essentially, the hearing officer has determined that the claimant fainted for an unknown reason. The hearing officer also determined that the claimant was in the course and scope of his employment when he fainted. The reason the hearing officer found against the claimant on the issue of compensable injury was because he found that the injuries sustained by the claimant were not a result of any instrumentality of the workplace. The hearing officer stated in the Background Information section of his decision that there was no instrumentality of the workplace which caused the fall.

We believe that the hearing officer misapplied the law in determining that the claimant's injuries were not a result of any instrumentality of the workplace. According to Texas case law cited herein an instrumentality of the employer does not have to cause the fall, the fall can be due to an idiopathic condition. The injuries that were sustained by the claimant occurred when his body contacted the pavement of the customer's parking lot. As previously noted, the term course and scope of employment includes an activity conducted on the premises of the employer or at other locations. The claimant was at the customer's location performing a work activity. The customer's premises included the paved parking lot that the claimant walked across to talk to the security guard about gaining access to another parking lot and started walking back across to get back to the employer's truck. The customer's paved parking lot was part of the conditions and environment of the claimant's employment. *See* Garcia, *supra*, regarding an injury arising out of employment because the employment had a causal connection with the injury either through its activities, conditions, or environments. We do not see a distinction between the facts of this case and Barrett, *supra*, wherein the court noted that the hard-surfaced road was an instrumentality essential to the work of the employer and falling against it was a hazard to which the employee was exposed because of his employment. Likewise, in the instant case falling against the customer's paved parking lot was a hazard to which the claimant was exposed because of his employment and it does not matter that the fall may have been from a syncopal episode as found by the hearing officer.

We conclude that the hearing officer's determination that the claimant did not sustain a compensable injury on _____, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. We reverse the hearing officer's decision that the claimant did not sustain a compensable injury and we render a new decision that the claimant sustained a compensable injury on _____. Based on unappealed Finding of Fact No. 5, we also reverse the hearing officer's determination that the claimant has not had disability and we render a new decision that the claimant had disability as a result of his compensable injury of _____, beginning on (day after date of injury), and continuing through the date of the CCH, June 16, 2005.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge