APPEAL NO. 950034
FILED FEBRUARY 17, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held to consider two disputed issues, namely, whether the respondent (claimant) sustained a compensable injury on _____, and whether he had disability resulting from that injury, and if so, for what period(s). Finding, among other things, that on _____, while driving from city 1 to city 2 at the direction of employer, claimant drove his employer's tractor truck into a lightning bolt, that he sustained an electrical shock throughout his body resulting in a variety of injuries, and that his "position with the Employer subjected him to a greater risk of harm than that confronted by the general public," the hearing officer concluded that claimant sustained a compensable injury on that date. She also made findings relative to the disability issue and concluded that claimant had disability from August 31, 1993, to March 31, 1994, and from August 1, 1994, to the date of the hearing.

The appellant (carrier) seeks our review of certain of the factual findings focusing in particular upon the sufficiency of the evidence to support the finding that claimant was subjected to greater risk of harm than the general public. The carrier also challenges the dispositive conclusions of law. The carrier further asserts error in the hearing officer's admission of testimony concerning the employer's policy of "reprimanding" drivers for late arrivals. Finally, the carrier challenges on relevance grounds findings relating to the carrier's disposition of the claim of Mr. F, a fellow employee, whose truck was hit by the same lightning, asserting that the hearing officer was influenced by the alleged favorable disposition by the carrier of Mr. F's workers' compensation claim. The carrier asks that we reverse the decision and render a new decision that claimant did not sustain a compensable injury and did not have disability resulting therefrom. The claimant's response urges the sufficiency of the evidence and requests our affirmance. The carrier filed a subsequent document alleging claimant's insertion of certain facts in his response to the appeal which are not in evidence and asking that we not consider them. Section 410.203(a) limits our review to the record developed at the hearing.

DECISION

Reversed and a new decision rendered that the carrier is not liable.

Claimant testified that on _____, he and Mr. F were instructed by employer's central dispatch office in city 3 to drive their trucks from employer's yard in city 1 to city 2, to arrive by 11:00 p.m., and to pick up "hot loads" and return to city 1. Mr. F testified that he and claimant "bobtailed" to city 2, that is, drove their tractor units without trailers to city 2 where they were to pick up trailers and drive them back to city 1. Claimant testified that it was raining before they left the yard, that city 1 was under a severe weather watch at that time, that "we called" the dispatcher a couple of times before leaving and "we told them we

were under a severe weather warning," but "they said go ahead and get to city 2." Claimant further testified that during the drive from city 1 he called the dispatcher three times and also communicated once via the truck computer and satellite communication system about the severe weather, and was told to continue to drive. He also stated that Mr. F also called once or twice. However, Mr. F testified he was aware of no communications with the dispatcher about the weather prior to their departure from the yard, that it was cloudy but not raining as they departed, that he did not know there would be a storm to drive through when they left the yard, that he had no communications with the dispatcher while en route before the lightning strike, and that drivers were instructed not to attempt to operate their computers while driving. At a later point in his testimony claimant said he had "keyed in" a report as he left the yard, and that once on the road he did not speak to the dispatcher until after the lightning strike.

Claimant testified that the city 1 traffic was very congested when they departed but had begun to thin out as they approached mile marker _____ on Highway heading west, the location where the lightning struck. Mr. F testified that they departed city 1 during the evening rush hour at about 5:30 p.m., that a light drizzle began shortly later, and that it began to rain harder with a lightning storm as they approached the location of the lightning strike, a distance he estimated to be about 20 miles from downtown city 1. Mr. F said he did not regard the lightning storm as unusual, describing it as "a normal situation." He said he had driven in "quite a few of them" and had once been struck by lightning while driving his personal vehicle. Mr. F, who was driving just ahead of claimant, also said there were many vehicles on the highway at the time the lightning struck. He further testified that after the lightning strike the traffic was "too thick" to safely pull onto the shoulder and that "there was cars all over the place," so he advised claimant on the CB radio that they would drive some distance to a weighing station where they would exit the highway and contact the dispatcher.

Claimant testified that he saw the lightning bolt about a mile ahead and watched it pass over Mr. F's truck and strike the ground in front of his truck. He said he drove into it and that it went under the truck and up into the truck through the foot feed, that it burned a spot on his leg, traveled up his leg and bounced between his legs. He said that his hair stood up and sparks flew from his fingers. He described a book of matches on the dashboard as igniting, said the truck became airborne and "flew" over three lanes, and that the truck's instruments were disabled. Mr. F, who said the lightning hit the back of his vehicle and in front of claimant's, described seeing claimant's truck in his rear view mirror veer to the left and then straighten out. Mr. F said he was dazed for a few seconds and then contacted claimant on the CB radio and that claimant reported feeling dizzy and like he was "burning inside." Mr. F said they continued on to a weighing station, spent about an hour attempting to communicate with the dispatcher, and were instructed to continue on to city 2, which they did.

Claimant testified that he worked for a month after the incident and then was taken off work by his doctor. He said that in April 1994 he began driving for another company at

about the same wages and that he worked through July when he stopped working because his feet would swell and he would get shoulder cramps. He said he has not since worked. He described his injuries as his hips locking up when he walks, backaches, shoulders locking up, visual blind spots, cramps, memory lapses, ringing in his ears, sexual dysfunction, and post-traumatic stress disorder.

Claimant testified, over objection based on relevance, that while the employer had a written policy granting discretion to drivers in deciding when to pull off the road until unsafe driving conditions abated, the actual policy was to "reprimand" drivers for late arrivals by assigning them to long-distance trips where they would have to spend a weekend away, not driving and thus not earning wages. On appeal, the carrier asserts error in admitting this testimony. Also, Mr. F testified that he, too, filed a worker's compensation claim but has not had a contested case hearing. The carrier raised a relevance objection to testimony about Mr. F's claim and has assigned its admission into evidence as an error on appeal. The carrier also challenges certain findings of fact pertaining to Mr. F's claim.

Section 406.032(1)(E) provides that an insurance carrier is not liable for compensation if the injury "arose out of an act of God, unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public." The hearing officer included in her Findings of Fact the following:

> 11. The Claimant's position with the Employer, a motor carrier, required that he drive long distances in every type of weather to further the Employer's business interests.
>
> 12. The Claimant's position with the Employer subjected him to greater risk of harm than that confronted by the general public.

The Texas courts have considered lightning an "act of God" but not without qualification. In Macedonia Baptist Church v. Gibson, 833 S.W.2d 557, 563 (Tex. App.-Texarkana, 1992, writ denied), a case involving a person injured by a "sideflash" when lightning struck the improperly installed lightning protection system on a church steeple, a concurring opinion by Justice Grant stated: "Lightning is ordinarily considered an act of God or nature. (*See* definition of *act of God*, Blacks Law Dictionary 33 (6th ed. 1990)). It is, however, an act of God only when it is uncontrolled and uninfluenced by human intervention. If the plaintiff had been struck by lightning uncontrolled and uninfluenced by human intervention while walking down the sidewalk, this would be considered an act of God for which the defendant would not be liable."

The court in United States Fidelity & Guaranty Co. v. Rochester, 281 S.W. 306, 308 (Tex. Civ. App.-Fort Worth 1926), aff'd, 283 S.W. 135 (Tex. 1926) stated: "That the bolt of lightning which caused the death of the deceased falls within the definition of `an act of God' there can be no doubt. The vital question is whether at the time of deceased's death he was engaged in the performance of duties that subjected him to a greater hazard from

the act of God referred to than ordinarily applies to the general public." In that case, the employee was struck by a bolt of lightning while digging a ditch on a pipeline in flat, open country using a steel-bladed shovel. The court, noting the case to be one of first impression, affirmed the lower court's finding that the employee's duties at the time subjected him to a greater hazard from the act of God than ordinarily applies to the public.

In Texas Compensation Insurance Company v. Ellison, 71 S.W.2d 309 (Tex. Civ. App.-San Antonio 1934, writ dism'd), a telephone switchboard operator received a shock through her headset while a storm was in the area and eventually died. The court noted that the employee was required to wear a headset connected by wire to the switchboard, that the switchboard was connected to "hundreds, perhaps thousands, of wires, from points far and near," and that such wires were capable of carrying electric currents generated by electrical disturbances over a wide area. The court stated the following:

> [the employee's work] subject[ed] her to the multiplied dangers peculiar to her employment, whereas the public generally, in that neighborhood, were not subject to that peculiar danger. Persons in the street, in the open fields, on the highways, in other buildings, or in other rooms in the same building were not so subjected. They were subject, of course to the danger of lightning, generally, wherever they were and whatever they were doing, but they were not subject to the peculiar, and obviously added, dangers incident to this particular employment in that particular place.

In Traders & General Insurance Company v. Pool, 105 S.W. 2d 492 (Tex. Civ. App.-Amarillo 1937, writ dism'd), an oil field worker was struck and killed by lightning as he exited his tent near the boiler he was charged with attending and the lower court found him to have been in the course and scope of employment at that time. Addressing the failure of the trial court to give the jury a legal definition of the term "act of God," the appellate court stated: "The question in the case was, not whether [employee] lost his life by virtue of an act of God, but whether or not he was, under the circumstances of his employment, subjected to a greater hazard than was the ordinary person in the same vicinity.

In State Highway Department v. Kloppenberg, 371 S.W.2d 793 (Tex. Civ. App.-Houston 1963, writ ref'd n.r.e.), the court found the evidence sufficient to affirm the lower court's determination that the work of the employee, who was struck by lightning while drilling a hole into a wet highway post on a rise with a steel brace and bit and who was wet from perspiration, "subjected him to a greater hazard from lightning than the ordinary public."

In Transport Insurance Company v. Liggins, 625 S.W.2d 780 (Tex. App.-Fort Worth 1981, writ ref'd n.r.e.) a truck driver was killed during a tornado. An expert witness testified that in his opinion an individual in a vehicle had a greater risk in a tornado than a person not in a vehicle and that a person in the path of a tornado would be safer in a building than in a vehicle. The appellate court found sufficient probative evidence to raise a fact issue as

to whether the employee was in the course of his employment at the time of his death and affirmed the trial court's judgment awarding benefits to the employee's beneficiaries. With respect to the act of God issue, the court said that "[w]hile there was evidence from which the jury might reasonably conclude that [employee's] death was caused by the tornado, that was not established as a matter of law." The court noted that the plaintiffs had not alleged the tornado as the cause of death and that the carrier offered no proof that the death was caused by an act of God. The Court further stated: "We agree with appellee's contention that although death from the tornado was a reasonable conclusion, the jurors might also reasonably have found that [employee] was killed in an accident before or after the tornado."

We believe the facts in Liggins distinguish it from the case we here consider, particularly in view of the expert evidence adduced in Liggins showing that the employee would have been exposed to a greater hazard from that act of God than the general public. We regard the evidence in the case we consider as more analogous to that in Continental Casualty Co. v. Smith, 227 S.W.2d 363, 365 (Tx. Civ. App.-Dallas, 1950, no writ). In that case, the employee was injured when the building he was in at work fell on him when struck by a tornado which, the evidence showed, destroyed in excess of 15% of an area in the city. Noting the definition of "injury" to except an act of God (placed in the Texas workers' compensation statute in 1917 and substantially similar to Section 406.032(1)(E)), the Court stated that the case was "controlled by our statute and the peculiar wording thereof, which injects the extra hazard element necessary when an act of God is present." Not looking to statutes of other states, the Court said:

> . . . there are sufficient decisions under our own Texas statute to justify us in holding that the following requirements are necessary to a recovery under our statute: The injuries received must have resulted from an extra hazard created by the particular employment itself, and differing from the hazard from an act of God as experienced by the general public within the path or wake of the tornado; that is, applied to this particular case, was the fact that appellee was, at the time, working in a building constructed of sheet iron with 2 x 6 studding an extra hazard from the tornado not experienced by the general public within its path or wake?

The jury found the employee to have been subjected to a greater hazard from the tornado than ordinarily applied to the public at that time. However, the appellate court could not say that there was a clear preponderance of the evidence to the effect that a building of sheet iron with 2 x 6 studding would be more hazardous than a frame structure, or other classes of structure generally used by the public as a whole in the city. Neither could the court say the evidence showed it was not more hazardous. Accordingly, the court remanded the case for a new trial.

We find that Finding of Fact No. 12 is against the great weight and preponderance of the evidence and for that reason reverse and render a decision that the carrier is not liable for claimant's injury. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Claimant had the burden to prove that his duties subjected him to a greater hazard from the lightning strike than that of the general public in the area. Weicher v. Insurance Company of North America, 434 S.W.2d 104, 107 (Tex. 1968). In that case, the Texas Supreme Court considered whether the employee's work exposed her to a greater hazard of "heat exhaustion" than that to which the general public was subjected and found in the record "a total lack of evidence showing that the heat and humidity to which the Petitioner was subjected had been intensified." The Court went on to note that "[t]he 'general public' should include those who were subject to the natural heat and humidity in the general locality of the place where Petitioner worked." The record in the case we consider contains no evidence that claimant was exposed to a greater hazard driving in the area of the storm which spawned the lightning bolt than were others in the locale.

The other findings apparently challenged by the carrier we find to be supported by sufficient evidence. With respect to the asserted error in admitting allegedly irrelevant testimony concerning drivers being "reprimanded" for late arrivals, we find no reversible error. Section 410.165(a) provides not only that the hearing officer is the sole judge of the relevance of evidence offered, but also that "[c]onformity to the legal rules of evidence is not necessary." The carrier also assigns error in the hearing officer's making Findings of Fact Nos. 8-10 to the effect that the Texas Workers' Compensation Commission (Commission) established claims for both claimant and Mr. F, that the carrier accepted Mr. F's claim and paid him benefits but did not pay benefits to claimant despite the fact that the two claims were based on the same incident, and that this "has the appearance of disparate treatment." The carrier contends these findings tend to show that the hearing officer was influenced by the carrier's different action on the claims. While hearing officers are not bound by the formal rules of evidence, the Appeals Panel has stated that those rules offer sound guides for hearing officers. With respect to the relevancy of evidence, "[o]rdinarily, evidence of acts or transactions other than those in issue, of or between third parties or strangers to the cause, or evidence of other transactions between one of the parties to the cause and a stranger, is inadmissible. This rule . . . is based on the principle that each act or transaction sued on should be established by its own particular facts and circumstances." 35 Tex. Jur. 3d. Evidence 189 (1984). We fail to see how the carrier's disposition of Mr. F's claim had any tendency to make the existence of any fact that is of consequence to the determination of the issues in claimant's case more or less probable than it would be without such evidence. Under the particular circumstances of this case, however, we do not find that the hearing officer committed reversible error.

The decision and order of the hearing officer is reversed and a new decision is rendered that the carrier is not liable for claimant's injury.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge