

APPEAL NO. 950103
FILED MARCH 3, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 19, 1994, a contested case hearing was held. The sole issue was whether (claimant), who is the claimant herein, sustained a compensable injury to his back in the course and scope of his employment with (employer) on _____.

The hearing officer determined that claimant had sustained an injury to his back in the course and scope of his employment; he rejected the carrier's argument that such injury was not compensable because it occurred during an "ordinary activity of life."

The carrier has appealed the hearing officer's findings and conclusions, arguing that the hearing officer erred "as a matter of law," because the injury occurred as the claimant was in the act of sitting down, and there was no proof of a defective condition at the work place, that such injury occurred outside the course and scope of employment because the general public would also be exposed to similar risk. There is no response from claimant.

DECISION

We affirm the hearing officer's decision.

The facts were simple and direct. The claimant, a partner in the employer's construction business, was employed as an estimator and salesperson. His job involves estimating and writing up bids. After he arrived at his office at 6:30 a.m. on _____, he stated he was in the act of sitting down at his desk to write up estimates when he felt a pull and burning pain in his lower back. He stated that the pain worsened in the two and a half hours he remained seated, to the point where he could barely move. Claimant's injury was diagnosed as a lumbar strain, for which he received chiropractic treatment.

According to the record, claimant had not missed more than two days of work, and a few hours "here and there," from his injury. There is an indication that his chiropractic bills have amounted to roughly \$700. Claimant said that except for occasional ordinary back pain through the years, he did not have back problems prior to the incident in question. Claimant characterized this incident as the worst pain he'd ever had.

We find no error, certainly not as a "matter of law," in the hearing officer's determination that the claimant was injured in the course and scope of his employment. Whether an employee is in the course and scope of employment when injured is ordinarily a question of fact, and each case must be determined on its peculiar facts. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App.- Dallas 1983, no writ). Those cases involving claims of injury from repetitive sitting and standing do not apply; the occupational disease definition specifically contains an "ordinary disease of life" exception that does not apply to every work-related injury. We have been called

upon in such cases to analyze whether the contended injury was in the nature of an ordinary disease of life, and as part of that analysis have looked at positional risk, as Section 401.011(34) directs us to do in an occupational disease case. The case at hand involves a discrete injury occurring at a definite time and place, and no contention was made that the injury occurred through repetitive trauma.

Second, Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993, and cited by claimant as support for its position, had to do with whether an activity that occurred within the ambit of the personal comfort doctrine could be considered compensable. In the case at hand, the claimant was not involved in personal comfort activities, but was directly engaged in desk work within the course and scope of his employment.

We note 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. Although carrier made the point at the hearing that there was no proof the chair in question slipped out from under claimant, we do not agree that this is the point governing compensability. Carrying the logic of carrier's argument further, this would also appear to make little difference because a chair at claimant's home could have slipped out from under him as well.

To the extent that carrier's argument presupposes that a work place defect or specific negligence of the employer should be proven in order to prove a "positional risk," such argument flies directly 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." There was no evidence offered to demonstrate that, at the time of his injury, the claimant was engaged in anything other than work which furthered the business of his employer or that he had deviated.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Neseholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge