APPEAL NO. 991312

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 May 18, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable cervical injury in the course and scope of his employment on _____, and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable cervical injury in the course and scope of his employment on _____, and had disability from August 10, 1998, through May 10, 1999. The appellant (self-insured) appeals, urging that the decision is against the great weight and preponderance of the evidence and that the issue in dispute is a question of law, which the hearing officer has incorrectly interpreted. The claimant replies that his injury occurred when he was furthering the business of his employer, and the decision should be affirmed.

DECISION

Affirmed.

The claimant, a safety coordinator, testified that on _____, he was making 150 to 180 copies of a newsletter on a color laser printer. The claimant testified that as he was bending down to pick up several copies out of the copy tray, he turned his head to the left and felt a "pop" in his neck. According to the claimant, he felt a sharp pain and dizziness, but it went away until the next morning when he woke up and his neck was stiff. The claimant testified that he had suffered two prior neck injuries in 1994 and 1995. In 1994, he was injured in a swimming pool, had surgery at C5-6, and returned to work without restrictions in February 1995. In October 1995, the claimant was involved in a motor vehicle accident, had a fusion at C5-6 and C6-7 in November 1996, and returned to work without restrictions in February 1997.

The claimant sought medical treatment with Dr. J on August 10, 1998, and was referred to Dr. G after an MRI showed a C4-5 disc bulge compressing the thecal sack. Dr. G diagnosed the claimant with cervical strain and symptomatic cervical spondylosis above his previous cervical fusion. The Texas Workers' Compensation Commission had the claimant examined by Dr. F on February 18, 1999. Dr. F examined the claimant and after reviewing the medical records, states:

> Yes he did sustain an injury on the date in question. He does have substantiated changes on his Myelogram and CT of a central herniated nucleus pulposus. At the same time he does have a pre-existing degenerative disc disease at C4-5, even back as early as 1994 when MRI studies were reviewed and showed he had a C4-5 herniate[d] disc at that point. [H]ere we have a gentleman who has had two previous neck

> operations and fusions. He was doing well but at the same time had MRI documented evidence of herniated disc C4-5 as reported. Then comes along and turns his neck at work and has immediate recurrence of his pain and disability which is documented by the myelogram and CT. It is my opinion that he aggravated his pre-existing neck problem by the incident of _____.

Dr. C testified on the self-insured's behalf and stated that the claimant's work activities did not cause the claimant's degenerative disc disease, that the activity the claimant was engaged in was not unique to his job, and that the claimant's herniation at C4-5 would have occurred at that time, anywhere.

The facts of this case are not in dispute. The hearing officer found that the claimant, while making copies at a copy machine in furtherance of the employer's affairs, bent down, turned his head, and felt pain in his neck. The self-insured asserts that the hearing officer erred in finding that the claimant sustained a compensable cervical injury on _____, because the facts fail to show the requisite nexus between the claimant's employment and his neck injury, and also fail to meet the requirements of the "positional risk" test. The self-insured takes issue with the hearing officer's reliance on Texas Workers' Compensation Commission Appeal No. 951076, decided August 18, 1995. The self-insured asserts that Appeal No. 951076 is at odds with other Appeals Panel decisions dealing with the same subject and, alternatively, Appeal No. 951076 is factually distinguishable.

Workers' compensation law is not tort law; a claimant does not have to prove that the employer was in some way negligent, or the premises defective, in order to recover for injuries sustained in the course and scope of employment, while the business of the employer is being furthered. The claimant had the burden to prove by a preponderance of the evidence that he 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. We have previously rejected the argument that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable based on that fact alone. As we stated in Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995:

> In many, if not most, instances an accident could either occur at work or away from work, and, as a result, the fact that an accident could have occurred at some other location does not mean that an on-the-job injury becomes noncompensable under the positional risk test. In addition, the use of the word "would" by the Bratcher [Employers' Casualty Company v.

> Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied] court in describing the "but for" test is indicative of the inevitability of the injury as opposed to the possibility that it could occur elsewhere. The purpose of the positional risk test is to ensure that there is some connection between the work and the risk of injury. That connection is present in this instance because claimant was at his regular duty station performing his work duties at the time of his injury. That is, "the employment brought the employee in contact with the risk that in fact caused his injuries." Bratcher, 823 S.W.2d at 722 (citing Walters v. American States Ins. Co., 654 S.W.2d 423 (Tex. 1983)). Accordingly, we dismiss carrier's assertion that claimant's injury is noncompensable under the positional risk doctrine.

In Appeal No. 951076, *supra*, a PBX operator 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. The opinion cited a similar case, Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), in which the employee, who was squatting while painting a tank, turned around when someone spoke to him, injuring his back. The court reasoned, "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. In our opinion the reason for plaintiff's turning and the turn were incidents of his employment." [Citations omitted.]

In Texas Workers' Compensation Commission Appeal No. 952057, decided January 16, 1996, a 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 self-insured 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 greater 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 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 this case, there is a connection, or nexus, between the claimant's work and his injury. The claimant testified, as found by the hearing officer, that his injury took place when he was moving to pick up pieces of paper from the printer. This activity was clearly part of his job and furthered the affairs and business of his employer. Where the printer was placed or whether it required any unusual activity by the claimant to retrieve the copies, is of no consequence. Both Appeal No. 951076, *supra*, and Appeal No. 952057, *supra*, are factually similar to this case whereas the cases cited by the self-insured, Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998, and Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, involved walking and getting out of a chair, respectively.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find the evidence sufficient to support the hearing officer's determination that the claimant sustained a compensable cervical injury in the course and scope of employment on _____.

The self-insured appeals the hearing officer's determination that the claimant had disability, asserting that the claimant did not sustain a compensable injury and therefore did not have disability. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on _____, the claimant could establish disability. The claimant testified that he was unable to work beginning August 10, 1998, as a result of his neck injury, and this is supported by the medical evidence. Whether disability exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We find the evidence sufficient to support the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge