APPEAL NO. 002179

On July 20, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____, and that the claimant had disability from March 3, 2000, to April 12, 2000. The appellant (carrier) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. No response was received from the claimant.

DECISION

Affirmed.

The claimant is a truck driver for the employer. On _____, he drove a truck that pulled two trailers from Irving to Austin and then started his return trip to _____ on Interstate 35 driving the truck that pulled two trailers. The claimant said that neither he nor his supervisors were aware of reports of inclement weather. The claimant said that the weather was fair when he left _____; that south of _____ he saw lightning in the distance and heard thunder; that he had his CB radio on and heard reports of rain and wind blowing; that he did not hear any reports of a confirmed tornado; that he is not able to contact his employer using his CB radio; that he did not pull off the road and call the employer on a telephone to report the bad weather because at unspecified times in the past when he has reported bad weather to the employer he has been told to continue driving unless the road is closed; that the interstate was not closed; that he has to drive the assigned route; that he has discretion as to when to take breaks; that about six miles north of Temple the truck he was driving and the trailers it pulled were blown over on their sides at 10:00 p.m; that he sustained various injuries in that accident; that other "vehicles" were turned over but that none of them were "passenger vehicles"; that although he did not see a tornado, he believed at the time of the accident that the truck was blown over by a tornado; that probably there was nothing he or anyone else could have done to prevent the accident; that either high winds or a tornado caused the truck he was driving and the trailers it pulled to turn over; that the trailers are 13 feet 6 inches tall from the ground to the top of the trailers; and that the trailers carried general freight.

DK, the employer's workers' compensation manager, testified that the employer's truck drivers have discretion as to when and where to take breaks and can deviate from their route for a justified reason. DK said that the employer has no policy that states that truck drivers must continue to drive through bad weather.

The claimant stated in answers to interrogatories that heavy rain and strong winds turned the truck over. The claimant wrote in an injury report that a tornado blew the truck over on the highway. The Department of Public Safety report concerning the accident states that high winds caused the truck the claimant was driving and the trailers it pulled to flip over. The doctor the claimant went to for his injuries on March 3 wrote that the

claimant told him that on _____ he had an accident when he was caught in a tornado while driving a truck with two trailers.

The hearing officer found that the claimant sustained multiple injuries when, in the course and scope of his employment as an over-the-road 18-wheel truck driver, high winds and/or a tornado tipped his vehicle over, on or about _____. The carrier appeals the following findings of fact and conclusion of law:

FINDINGS OF FACT

3. The 18 wheeler truck the Claimant was operating on _____, was 13 feet 6 inches high, which made the truck more susceptible to high winds/tornados, than ordinarily applies to the general public.

4. The Claimant's job duties as an over-the-road 18 wheel truck driver, performing his job in the course and scope of his employment, by its very nature exposed the Claimant to a greater risk of injury from an "act of God," than ordinarily applies to the general public, as members of the general public do not ordinarily drive 18 wheel trucks over the road 8 hours a day.

CONCLUSION OF LAW

3. The Claimant sustained a compensable injury on _____.

The carrier contends on appeal as it did at the CCH, that Section 406.032(1)(E) applies to this case. That section 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. In Continental Casualty Co. v. Smith, 227 S.W.2d 363 (Tex. Civ. App.-Dallas 1950, no writ), the court stated: "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; . . ."

The carrier asserts that the claimant did not provide any evidence that his job duties as a truck driver exposed him to a greater risk of injury from high winds or a tornado than that ordinarily experienced by the general public. We disagree with the carrier's assertion.

We noted in Texas Workers' Compensation Commission Appeal No. 972327, decided December 29, 1997, that certain hazards created by the weather, such as ice on the sidewalk and, in the instance of Appeal No. 972327, water on steps, do not rise to the level of an "Act of God." In Appeal No. 972327, we quoted from Texas Workers' Compensation Commission Appeal No. 951325, decided September 25, 1995, which cited Mid-Continent Casualty Co. v. Whatley, 742 S.W.2d 475 (Tex. App.-Dallas 1987, no writ) wherein the court determined that the terms "windstorm" and "Act of God" were not

necessarily "equivalents capable of being interchanged" and quoted Transport Insurance Co. v. Liggins, 625 S.W.2d 780, 782-783 (Tex. App.-Fort Worth 1981, writ ref'd n.r.e.) as stating:

> By the term "act of God" as used herein is meant any accident that is due directly and exclusively to natural causes without human intervention and which no amount of foresight, pain, or care, reasonably exercised, could have prevented. The act must be one occasioned by the violence of nature, and all human agency is to be excluded from creating entering into the cause of the resulting mischief. The term implies the intervention of some cause not of human origin and not controlled by human power. [Emphasis added.]

The exercise of a modicum of care, simply stopping the truck for a short while until the storm passed, would have resulted in the claimant's not having entered into the proximity of the high winds or postulated tornado which blew against the sides of the trailers with sufficient force to blow the truck over. Under the circumstances presented, especially in light of the claimant's apparent uneasiness in continuing his trip in bad weather, it appears that a reasonable amount of foresight, pain, or care could have prevented the accident at bar.

The circumstance of the claimant's accident is similar to the situation in Security Union Casualty Co. v. Brown, 297 S.W. 1081 (Tex. Civ. App.-Beaumont 1927, writ ref'd). The court in Brown, *id.,* upheld a judgment in favor of an oilfield worker's beneficiaries after the worker had been killed when a violent windstorm blew down the derrick he was working on. The court found that the evidence that a number of derricks had been affected by the windstorm which left houses relatively untouched was sufficient to support a finding that the worker was subject to a greater hazard than the general public. A companion case, Security Union Casualty Co. v. Kelley, 299 S.W. 286 (Tex. Civ. App.-Beaumont 1927), affirmed 6 S.W.2d 741 (Tex. Comm'n App. 1928, holding approved) (respondent shown as Kelly in the court of civil appeals opinion and as Kelley in the commission of appeals opinion) upheld a judgment for another deceased worker's beneficiaries on the same grounds. The hearing officer found, based on the evidence before him, that the vehicles affected by the windstorm or tornado were all 18-wheel trucks, and that the size and relative weight of the trailers was instrumental in the cause of the accident.

On several occasions, we have stated that the matter of whether the employment exposed a claimant to a greater risk of injury than that of the general public is generally a question of fact for the fact finder. Texas Workers' Compensation Commission Appeal No. 972084, decided November 26, 1997 (worker struck by lightning while tilling a sewage treatment bed), and Texas Workers' Compensation Commission Appeal No. 951820, decided December 18, 1995 (custodial employee struck by lightning while picking up trash with a metal pole). The hearing officer found that the type of vehicle driven by the claimant on the date of the injury was a factor in the resulting accident and that the claimant's employment exposed him to a greater risk of injury than that of the general public, even if the general public is considered to be only travelers on the stretch of interstate highway

where the claimant's accident occurred. The hearing officer found that the claimant in this case was at a greater risk from the act of God by virtue of the inherent nature of the vehicle driven by the claimant, as were the workers on the oil derricks in Brown, *supra*, and Kelley, *supra*.

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). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the hearing officer's decision and order.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

I respectfully dissent. The appealed findings that, due to the height of the truck, the truck was more "susceptible to high winds/tornadoes, than ordinarily applies to the general public," and that the claimant's truck-driving job "by its very nature exposed the Claimant to a greater risk of injury from an 'act of God,' than ordinarily applies to the general public" are not supported by any evidence. I would reverse the hearing officer's decision and render a decision that the carrier is not liable for compensation under Section 406.032(1)(E).

Robert W. Potts
Appeals Judge