

APPEAL NO. 011971  
FILED SEPTEMBER 28, 2001

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 July 30, 2001. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on \_\_\_\_\_, and that the claimant had disability resulting from the compensable injury of \_\_\_\_\_, from January 24, 2001, through February 20, 2001, and from March 10, 2001, through the date of the CCH. The appellant (self-insured) appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

**COMPENSABLE INJURY**

The hearing officer did not err in determining that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant, a maintenance worker for the self-insured, testified that filling the weedeater with gasoline is one of his job duties. He said that on \_\_\_\_\_, as he was holding up a gas can pouring gas into the weedeater while at work, he coughed and felt severe pain in his back and on his left side under his shoulder blade, and fell to the ground. Two coworkers witnessed the claimant having physical problems while pouring the gas into the weedeater, or immediately thereafter. The claimant was immediately taken to a hospital. Thereafter, he was seen by his treating doctor, who diagnosed the claimant as having a thoracic strain, cervical strain, and left shoulder strain. The self-insured contended that the claimant sustained an ordinary disease of life, and put into evidence a report from its peer review doctor. The hearing officer found that the claimant sustained an injury in the course and scope of his employment and concluded that the claimant has a compensable injury. See Sections 401.011(10), 401.011(12), and 401.011(26).

With regard to the self-insured's assertion that the claimant has an ordinary disease of life, the self-insured argues that under the positional risk test, there was no connection between the work and the risk of the injury because the injury was when the claimant coughed, and not while the claimant was performing any activity of work. The evidence reflects that the injury occurred while the claimant was holding up a gas can pouring gas into the weedeater as part of his job duties. The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 000074, decided February 25, 2000, that the exclusion of ordinary diseases of life from the definition of injury in the 1989 Act applies to occupational disease injuries, but not to a discrete, accidental injury, citing Sections 401.011(26) and 401.011(34). In Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995, the Appeals Panel noted that in many 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 Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999, the Appeals Panel noted that it did not agree with a carrier's argument that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable for that fact alone. Whether the claimant was injured in the course and scope of his employment was a fact question for the hearing officer to decide from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165 (a). We conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

### **DISABILITY**

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Conflicting evidence was presented on the disability issue. The hearing officer resolved the conflicts and determined that the claimant had disability from January 24, 2001, through February 20, 2001, and from March 10, 2001, through the date of the CCH. The hearing officer's decision is supported by the claimant's testimony and by the reports of the treating doctor. The hearing officer's decision on the disability issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(carrier)** and the name and address of its registered agent for service of process is

**SM  
EMPLOYER  
ADDRESS  
CITY, TEXAS.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge