APPEAL NO. 951820

This appeal is brought 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 September 14, 1995. She determined that the appellant (claimant herein) sustained an "injury" at work as a result of a lightning strike; that the lightning strike was an act of God which relieved the respondent (self-insured herein) of liability for compensation; and that the claimant did not have disability. The claimant appeals, arguing that the hearing officer erred in refusing to find good cause to admit a medical report into evidence and that her determinations regarding the self-insured's liability and regarding disability were against the great weight and preponderance of the evidence. The self-insured replies that the decision and order of the hearing officer are correct as a matter of law; are supported by sufficient evidence; and should be affirmed. Although the subject of much discussion at the CCH, neither party has appealed the findings of the hearing officer that the claimant was injured by a lightning strike while performing his assigned duties on _____. These findings have now become final. Section 410.169. Unless otherwise indicated, all dates are in 1995.

DECISION

Affirmed.

We address first the evidentiary ruling appealed by the claimant. At the hearing, the claimant offered into evidence as Claimant's Exhibit 11 documents from Dr. A, D.C., the claimant's treating doctor. The documents included in Exhibit 11 consisted of a one-page Specific and Subsequent Medical Report (TWCC-64) reflecting the results of a visit by the claimant with Dr. A on September 13th, the day before the hearing. In addition, the exhibit included 12 pages of Dr. A's billings for visits from April 5th through September 7th. These 12 pages reflect essentially the type of service rendered; the date of the service; the charge for the service; and whether it was paid or not. The claimant's attorney represented to the hearing officer that she only received the exhibit the morning of the hearing, could not have exchanged it earlier than at the hearing and thus demonstrated good cause for its admission. The carrier objected to the admission of this evidence on the grounds that the claimant had been treating with Dr. A for a number of months and had not established good cause for arranging an appointment with him the day before the hearing. The hearing officer, finding no good cause for an untimely exchange of the exhibit, denied its admission into evidence.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ? 142.13 (Rule 142.13) deals with discovery generally and the time limits for the exchange of evidence. Rule 142.13(c) provides for the exchange of medical records no later than 15 days after the benefit review conference and "[t]hereafter, parties shall exchange additional documentary evidence as it becomes available." Rule 142.13(c)(2). Untimely exchanged documents may be admitted on a showing of good cause. Rule 142.13(c)(3). There was no evidence or suggestion that the claimant intentionally scheduled an appointment with Dr. A the day before the

hearing in order to avoid the requirements for timely exchange or that the claimant's attorney received the documents contained in Exhibit 11 earlier than she represented at the hearing. We are thus hard-pressed to conclude that the claimant did not exchange them as they became available or that good cause was not established, at least for the admission of the TWCC-64. Any error in the exclusion of this exhibit was, we believe, harmless. *See* Texas Workers' Compensation Commission Appeal No. 91003, decided August 14, 1991. The computerized billing records, though indisputably in existence or available for generation in hard copy well before the hearing, were irrelevant to any issue before the hearing officer. Dr. A testified by telephone at the hearing. He discussed the claimant's condition, his diagnoses, and proposed course of treatment and was subject to cross-examination. His testimony included information contained in the TWCC-64 in Exhibit 11 and addressed all the issues in dispute, particularly the nature of claimant's injuries and his belief that they were caused by a lightning strike, matters not appealed. From this, we conclude that the claimant was able to produce through testimony whatever would have been available in the single page report and that any error in refusing to admit the report and Exhibit 11 in its entirety was harmless.

Section 406.032(1)(E) provides that a 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 claimant worked as a custodian for the self-insured. He testified that, as part of his normal duties, he was picking up trash outside at approximately 5:30 p.m. on January 12th. He stated that there was lightning in the area, but that he was refused permission from his supervisor to seek shelter. He stated that he was directed to use a metal stick to pick up the trash and that at the time of the lightning strike he was next to a single-story building and across from a higher building. According to the claimant, when the lightning struck him, it knocked him down and left him unconscious for five or ten minutes. According to Dr. A, the injuries resulting from the lightning strike were lumbar disc syndrome, cervical radiculitis, thoracic segmental dysfunction, headaches, numbness in the right hand and suspected cognitive dysfunction, including memory loss. The medical evidence does not reflect any burns to the claimant's body.

The claimant contended both at the hearing and on appeal that his location "in an open area and the use of the metal tool held by the claimant coupled with his wet body or clothing from the rain provided a greater attraction of lightening [sic]" thus exposing him to a greater risk of injury from this act of God than the general public. The hearing officer found that the claimed injuries were not compensable because, though they arose out of an act of God, the claimant was not at a greater risk of harm from lighting "than the general public in and around" the place where the incident occurred. In her discussion of the evidence, the hearing officer stated that she was not persuaded by the claimant that he was wet at the time of the lightning strike; stated that he was near a telephone pole and two buildings that were more elevated from the ground than the claimant; and opined that

the "only peculiar and added danger to which Claimant was subject was the use of the metal stick, and this factor alone is insufficient to amount to a clear preponderance of evidence in his favor." The relevance of the factors of wetness, the use of a metal stick and height above the ground to the likelihood of a lightning strike were considered matters of judicial notice.

In Texas Workers' Compensation Commission Appeal No. 950034, decided February 17, 1995, and Texas Workers' Compensation Commission Appeal No. 950020, decided February 17, 1995, the Appeals Panel discussed at length the application of the act of God concept to lightning strikes, including a discussion of applicable precedent. These cases support the propositions that lightning strikes are, generally speaking, considered acts of God; that judicial notice can be taken to some degree about the course of lightning strikes; that a claimant who has sustained a lightning strike in the course and scope of employment has the burden of proving that the employment exposed the employee to a greater risk of injury than ordinarily applies to the general public; and that whether the employee is exposed to a greater risk is generally a question of fact.

Appeal No. 950034, *supra*, reversed a decision of a hearing officer that a long-distance truck driver who drove into a bolt of lightning and was injured was exposed by this employment to a greater risk of injury from lightning strikes, and a decision was rendered that he was not so exposed. The undisputed evidence in that case was that the claimant was struck by lightning on a stretch of Interstate 10 just west of city under conditions of heavy traffic. In Appeal No. 950020, *supra*, the Appeals Panel affirmed a decision of the hearing officer that the employee, who was struck by lightning, was placed in a greater risk by virtue of his employment. In that case, the employee was working in an open field and standing near a steel valve.

Much of the discussion at the CCH in the case we now consider dealt with where the claimant was when struck by lightning. This was largely motivated by the series of cases, discussed in the decisions mentioned above, which generally find a greater risk of lightning strikes in those situations where the employee is standing on open, level terrain. The claimant himself testified that he was working next to a building, was near another building and there was a telephone or light pole nearby. Thus, there was sufficient evidence to conclude that the level terrain factor, prominent in other cases, was not a factor in this case. Similarly, there was a vigorous dispute at the CCH over whether or not the claimant was wet from the rain at the time of the lightning strike. The claimant gave inconsistent testimony on this question, at one point saying he was not wet and at another point saying he was not excessively wet. In State Highway Department v. Kloppenberg, 371 S.W. 2d 793 (Tex.Civ. App.-Houston 1963, writ ref'd n.r.e.), discussed in both Appeal No. 950034, *supra*, and Appeal No. 950020, *supra*, a lightning strike case, a finding of greater risk was upheld based in part on findings that the injured worker was drilling a hole in a wet post "on a rise . . . [and] . . . was wet from perspiration." The hearing officer in the case now appealed concluded that the claimant did not establish "that his body was wet" at

the time of the injury. We believe this is a fair inference from the evidence, and we find no error in the hearing officer's conclusion that this was not a factor which added to the risk in this case.

The claimant also contends that his use of the metal stick to pick up trash, whether alone or in combination with the other facts of terrain and wetness, raised his risk of being injured by lightning above that of the general public. In many of the cases discussed in Appeal No. 950034, *supra*, and Appeal No. 950020, *supra*, the fact that the injured worker was using or near a metal object was important to the outcome and the role of the metal in attracting a lightning strike was to some degree considered a proper subject of judicial notice. In the case now appealed, the hearing officer found the claimant's use of a metal stick insufficient in itself to establish a greater risk. The claimant was willing to rely on judicial notice to provide evidence on the ultimate issue of risk. This of course was at the claimant's peril because he had the burden or proof and, unlike other cases involving an open level field, the evidence in this case was that the claimant was between high buildings. We are unwilling to find from these facts that the hearing officer was compelled, as a matter of law, to conclude that the use of a metal stick in itself or in combination with some other factor or factors[1] placed the claimant at greater risk of injury from a lightning strike than the general public. The hearing officer was the sole judge of the weight and credibility of the evidence presented. Section 410.165(a). We will reverse a hearing officer's findings only if they are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Having reviewed the record in this case, we are satisfied that there was sufficient evidence to support the decision of the hearing officer that the claimant's injury was caused by an act of God and that the claimant was not exposed to any greater risk of harm than the general public. The carrier is thus relieved of liability in this case.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

[1]The dissent suggests that the hearing officer erred in considering the factors of open space, wetness and metal stick separately rather than together. We do not agree that she did not consider these factors in combination. But this suggestion that they must be considered as synergistic in effect or mutually enhancing the likelihood of exposure to a lightning strike, however persuasive as a proposal, does little good in the absence of evidence as to how they work together and only reinforces the peril of proceeding on the theory that the hearing officer, from common experience, knew how to evaluate these factors.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

With due respect to my learned colleagues in the majority, I am constrained to dissent because I believe that the hearing officer improperly applied an incorrect standard of proof to the doctrine that if the work places a worker at greater hazard from an act of God than ordinarily applies to the general public, then an injury due to an act of God is compensable. This is because, first, the hearing officer seems to discount any hazard to which any other person may subject himself or herself as one which ordinarily applies to the general public. Secondly, the hearing officer seems to consider the risk factors separately rather than as a whole to determine whether the claimant is at greater risk than the general public.

The hearing officer stated the rationale for her decision as follows in the portion of her decision labeled "Discussion":

> Claimant argued that he was subject to a heightened risk of danger from lightning because he was outside, his body was wet, he stood alone on open ground, and he held a metal stick. Evidence presented showed that there were other persons outside the school at the time of the lightning strike. Numerous students remained on the school grounds and the school's marching band was practicing on the football field at the time that Claimant suffered his injuries. There were others in open fields, next to buildings, or otherwise similarly situated as Claimant. The general public in that vicinity at that time was subject to the same danger of harm from lightning.
>
> Furthermore, Claimant's testimony that his body was wet at the time of the lightning strike was not credible. The evidence established that at the time of his injury, he was near a telephone pole and two buildings that were more elevated from the ground than was his body. The only peculiar and added

> danger to which Claimant was subject was the use of the metal stick, and this factor alone is insufficient to amount to a clear preponderance of evidence in his favor.

To me this analysis does not apply the proper standard of proof needed to show that the injured worker was at a greater hazard from an act of God than ordinarily applies to the general public. This is because the test applied by the hearing officer would require the claimant to show that no other person is subject to the hazard. Or, put another way, the hearing officer's test is: if any other person or persons subject themselves to the hazard, the worker is not at greater risk. I do not believe this is the proper test and does not show a proper understanding for what "a greater hazard than applies to the general public" really is. To me the underlying rationale of the rule is to only compensate workers who are required by their work to be at greater risk than the general public is required to be. However, if some members of the public choose to subject themselves to a hazard, this does not make it a hazard that *ordinarily* applies to the *general* public. In the present case the fact that others failed to take shelter during a thunderstorm did not make the general public subject to the same risk of being struck by lightning as the claimant whose work required that he be out of doors.

Also it appears to me that when looking at the risk factors required by the claimant's work they should judged in combination with one another, not singly. This is because this is one of those situations in which the whole may be greater than the sum of the parts. It seems to me that here the hearing officer tried to view each risk factor one at a time and therefore may have improperly judged their impact acting in conjunction with one another.

Also, underlying this case, there may be a feeling that the claimant is undeserving of benefits because he may not have been struck by lightning at all. The carrier certainly raised this argument repeatedly during the CCH, even though this is not in issue, making it impossible to decide the case on this basis. Sometimes the strict application of legal doctrines will lead to a result that one might feel is inequitable. To misapply legal doctrine in a specific case to prevent this from happening, however, warps the law itself in a way that can only result in even greater injustice in later cases.

I would reverse and remand, instructing the hearing officer to apply the proper standard of proof.

Gary L. Kilgore
Appeals Judge