APPEAL NO. 991714

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 15, 1999, a contested case hearing (CCH) was held. The hearing officer determined that: (1) the claimed injury of the respondent (claimant) did not arise out of an act of God; (2) the compensable injury "includes" injuries to the "head, neck, left shoulder, and low back in addition to multiple contusions and abrasions"; (3) appellant (carrier) did not specifically contest compensability on the issue of extent of injury; and (4) claimant had disability from November 23, 1998, through February 10, 1999. Carrier appeals these determinations on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant's injury did not arise out of an act of God. Carrier asserts that the "black ice" on the road was not foreseeable, that the accident was caused by the forces of nature without human intervention, and that the employer did not have control over the roads in (State A) where the accident occurred.

Claimant testified that in the early morning hours of _____, he was driving a truck in the dark down a highway in State A, when he hit a patch of ice and had a rollover accident. Claimant said there was no snow, that it was not raining, and that he did not see the ice. Claimant said he injured his head, left shoulder, neck, and low back, and that he had several bruises. Claimant said that his neck and back began to bother him about a week after his injury. He said he went home and began treating with Dr. H after his injury. Claimant said he asked for a work release, that he was released to return to work in February 1999, and that he returned to work on March 1, 1999.

A _____, "emergency department" record states that claimant complained of right-sided headache and left shoulder pain and that a laceration on his scalp was sutured. Under "assessment," it states "right scalp laceration" and "multiple contusions and abrasions." Various records from Dr. H state that claimant was experiencing neck and back pain.

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 hearing officer determined that claimant's injury did not "arise out of an act of God" and also

determined that claimant was exposed by his employment to a greater risk of injury from an act of God than ordinarily applies to the general public.

In Transport Insurance Co. v. Liggins, 625 S.W.2d 780 (Tex. App.-Fort Worth 1981, writ ref'd n.r.e.), the court of appeals defined "act of God" as follows:

> 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 or 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].

In Mid-Continent Casualty Co. v. Whatley, 742 S.W.2d 475 (Tex. App.-Dallas 1987, no writ), the court affirmed a determination that an employee was in the course and scope of employment when he was injured after a tree limb struck the trailer he was working in during a windstorm. The court in Whatley determined that the terms "windstorm" and "act of God" were not necessarily "equivalents capable of being freely interchanged." The court said:

> This limb, because of its condition, constituted a hazard which Whatley's employer, in the exercise of reasonable care, should have earlier discovered and removed to "exclude" the mischief which it created for employees working below in a make-shift office.

Therefore, the court decided that human intervention or “foresight, pain or care, reasonably exercised” could have prevented the injury in that case. In other words, the tree owner could have inspected and removed any rotting branches that could fall and cause injuries.

In the case now before us, the hearing officer determined that the ice on the road did not constitute an act of God within the meaning of the 1989 Act. In deciding whether the accident was caused by an act of God, the issue was whether the injuries were "attributable to an accident due to violent natural causes so beyond human power as to be unpreventable." Whatley, *supra.* Claimant was asked about the weather conditions and he said he did not see any signs warning of ice during the 30 minutes he had been driving that morning. There was no evidence from the highway department of State A regarding whether signs actually had been posted, or evidence regarding the weather the night before claimant began driving. Claimant said he did not call in to check on weather conditions.

The hearing officer could consider that ice on the road can be, and often is, covered with sand by road crews. Further, chains may be used by drivers, trucking employers may warn truck drivers of weather conditions and change their routes, and warning signs regarding ice may be posted by the highway department. Considering this, we conclude

that the hearing officer did not err in determining that the accident on the black ice did not rise to the level of an act of God under the statute. "Foresight, pain or care, reasonably exercised," *i.e.* human intervention, is something that can prevent accidents on ice, just as cutting down a rotting tree limb may prevent an injury from a falling tree limb. The hearing officer could determine that the accident on the icy road was not occasioned by the "violence of nature" as contemplated in the 1989 Act. Accordingly, we find no error in the determination that carrier was not relieved of liability under Section 406.032(1)(E).

Carrier asserts that the black ice was an act of God because it was not something that could be removed "by employer," as was the case in Texas Workers' Compensation Commission Appeal No. 951325, decided September 25, 1995.

However, the issue is not whether *the employer* could have taken action to remove the black ice, but that *something can be done,* through human intervention, to prevent accidents on ice. We perceive no error in the hearing officer's determinations in this regard.

Carrier contends the hearing officer erred in determining that the claimant's injury included a neck and back injury. Carrier asserts that discomfort alone is not an injury. Carrier also contends that claimant did not prove an injury by expert medical evidence.

Carrier does not dispute that claimant sustained a compensable injury in the form of a shoulder strain and cut on his head. Claimant testified that he had neck and back pain that began about one week after his injury.

Under the 1989 Act, the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." The hearing officer is the sole judge of the weight and credibility to be given to the evidence and the relevance and materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer may believe all, none, or any part of any witness's testimony and may properly decide what weight he should assign to the evidence before him. Campos. We will not substitute our judgment for the hearing officer's where his determinations are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that "claimant met his burden and proved he injured his head, his neck, his left shoulder, his low back, and sustained multiple contusions and abrasions as a result of the accident." This issue involved a fact question for the hearing officer, which he resolved. Texas Workers'

Compensation Commission Appeal No. 951959, decided January 3, 1996. The hearing officer could determine that claimant sustained an injury to his back and neck based on his testimony alone, if the hearing officer found that testimony credible. The hearing officer could decide to believe all, none, or any part of the evidence and he decided what weight to give to the evidence. Campos, *supra*. The fact that claimant did not immediately complain of a neck and back injury at the emergency room was a factor for the hearing officer to consider in resolving the fact issues in the case. After reviewing the evidence, as set forth above, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra.*

Carrier contends the hearing officer erred in determining in Finding of Fact No. 13 that "there is no extent of injury issue because no compensable injury [had been previously] established prior to the hearing or by agreement of the parties." Conclusion of Law No. 4 states that "the carrier did not specifically contest compensability on the issue of extent of injury pursuant to [Section 409.022 and Rule 124.6]." Carrier contends that this conclusion of law is "moot" because of the determination in Finding of Fact No. 13. Carrier asserts that Conclusion of Law No. 4 is incorrect as a matter of law and that it was not required to dispute each and every body part claimed to be part of the injury.

Extent of injury was not an expressly stated issue at the benefit review conference (BRC). The issue regarding injury was, "does the compensable injury include injuries to the claimant's head, neck, left shoulder, and low back in addition to multiple contusions and abrasions." Carrier had not accepted any part of the injury and, at the BRC, disputed that claimant sustained an injury in the course and scope of employment. Carrier contended that if claimant did have any injuries, they were to his scalp and left shoulder, only. At the CCH, carrier agreed that claimant injured his scalp and shoulder, but maintained that claimant did not injure his neck and back.

We perceive no error regarding the determination that "there was no extent of injury issue" because this was not a specifically stated issue at the BRC or the CCH. Although the hearing officer decided what claimant's injuries included because of the way the issue was stated, it was not what is normally known as an "extent of injury issue." We also perceive no error regarding the conclusion of law that carrier did not specifically contest compensability on the issue of extent of injury. In its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed December 1, 1998, carrier did not accept part of the injury and then dispute regarding one body part. On the TWCC-21, in relevant part, carrier stated, "Carrier disputes compensability, disability, and extent of injury. Carrier denies the claimant sustained any work related [injury] . . . ." Therefore, we cannot say that the hearing officer's Conclusion of Law No. 4 is in error. In any case, we note that the hearing officer did decide the injury issue in claimant's favor. We perceive no reversible error in the complained-of findings and conclusions.

Carrier contends the hearing officer erred in determining that claimant had disability from November 23, 1998, to February 10, 1999. Carrier asserts that claimant did not have disability because carrier is relieved of liability under the act of God provision of the statute. Carrier also contends that if claimant had disability, it ended as of January 11, 1999, the date Dr. B examined claimant.

We have already determined that carrier is not relieved of liability under the act of God provision and we reject claimant's contention in that regard. There is evidence from Dr. H dated after January 11, 1999, that stated that claimant could not return to full duty. In his January 11, 1999, report, Dr. B did not state an opinion regarding whether claimant could work. In a February 10, 1999, note, Dr. H stated that claimant could return to work for a two-week "trial" period. Based on this evidence, we conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge