APPEAL NO. 002641

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 12, 2000. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that even though the lightning that injured the claimant on _____, was an act of God, the appellant (carrier) is not relieved of liability under Section 406.032(1)(E) because the claimant's employment exposed her to greater risk of injury from the lighting than ordinarily applies to the general public; and that the claimant has had disability as a result of her compensable injury from March 15, 2000, through the date of the hearing. In its appeal, the carrier contends that the hearing officer erred in determining that the claimant's employment exposed her to a greater risk of injury from a lightning strike than applies to the general public. In her response to the carrier's appeal, the claimant urges affirmance. The carrier did not appeal the determination that the claimant was in the course and scope of her employment at the time that she was struck by lighting and that determination has, therefore, become final under Section 410.169.

DECISION

Affirmed.

The parties stipulated that the claimant was struck by lightning on _____; that she was injured by the lightning strike; and that since March 15, 2000, the claimant has been unable to work due to the injuries caused by being struck by lighting. The claimant testified that she was returning to work from lunch and was walking from her car toward the store on _____, when she was struck by lightning. 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 only issue before us on appeal is whether the hearing officer erred in determining that the claimant's employment exposed her to a greater risk of being struck by lightning.

The claimant testified, and a memorandum from the employer dated January 11, 2000, confirms, that the employees of the home improvement store were required "to park along the outer parking lot beyond the cart corrals." That memorandum also requires that the employees enter only through the main entrance of the store and that "[t]here are no exceptions to this directive. . . ." The claimant testified that she had walked from her car toward the area in the parking lot where the first cart corral was located, when she was struck by lightning. She stated that in the area of the cart corral, there was also a small tree, which was being supported by four to five feet tall metal stakes. Mr. F, an off-duty fire fighter, was in the parking lot of the store and he performed cardiopulmonary resuscitation on the claimant shortly after she was struck by lightning. In a June 24, 2000, letter, Mr. F stated that the lightning struck a metal rod that was supporting a small tree next to the cart corral. Mr. F noted that it "appeared that the electrical charge hit the metal tree supporting rod, traveled along the ground, through the metal basket holder and then got [the

claimant]." Mr. F further stated that subsequent to the incident, the metal poles supporting the trees in the parking lot area were removed. The claimant also testified that when her daughter went to get the claimant's car on March 15, 2000, the metal poles supporting the trees in the parking area had been removed, but that the ones in the area surrounding the parking lot were not removed.

The claimant also introduced a report from Mr. S, a forensic engineer. In his report of August 15, 2000, Mr. S concluded that the claimant's employment placed her at greater risk of being struck by lightning than the general public because she was required to park further out in the parking lot and was required to use a specific entrance, increasing the likelihood that an employee would be injured by a lightning strike by lengthening the total amount of time that the employee would be exposed to lightning hazards. Mr. S also noted that the existence of isolated trees and metallic poles in the parking lot created "an additional hazard and would statistically improve the probability of lightning in that area." Finally, Mr. S opined that the employer could have reduced the likelihood of injuries from lightning strikes by providing safety training to its employees about lightning hazards.

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 (Unpublished); Texas Workers' Compensation Commission Appeal No. 951820, decided December 18, 1995. In this instance the hearing officer determined that the claimant's employment exposed her to greater risk of injury from a lightning strike than ordinarily applies to the general public because of the employer's parking and access policy and the claimant's compliance with those policies, the employer's placement of metal poles in the area of the parking lot, and the lack of guidance or safety training provided to the employees. The evidence from the claimant, Mr. F, and Mr. S support the hearing officer's determination in that regard. Nothing in our review of the record demonstrates that the hearing officer's determination that the claimant was at greater risk of injury from a lightning strike than the general public is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, no sound basis exists for us to reverse the hearing officer's determination on appeal. The carrier cites Texas Workers' Compensation Commission Appeal No. 950034, decided February 17, 1995, and contends that it necessitates reversal in this instance. We cannot agree. In that case, the Appeals Panel reversed a determination that the claimant was exposed to a greater risk of being struck by lightning because it was not sufficiently supported by the evidence. In this instance, the hearing officer made a finding that the claimant was exposed to greater risk and we have determined that that determination is not so against the great weight of the evidence as to compel its reversal; thus, even Appeal No. 950034 would counsel for affirmance in this instance.

The carrier's challenge to the disability determination is premised upon the success of its argument that it is relieved of liability in this case. Given our rejection of that argument, we likewise reject the disability challenge.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge