

APPEAL NO. 081733
FILED JANUARY 21, 2009

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 22, 2008. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____.

The claimant appealed, contending that he was in the course and scope of his employment at the time of his injury. The respondent (carrier) responds, urging affirmance and separately, requested correction of a clerical error regarding an inconsistency in the hearing officer's order.

DECISION

Reversed and a new decision rendered as reformed.

In his appeal, the claimant correctly notes that he was assisted by an ombudsman rather than represented by an attorney. We reform so much of the hearing officer's decision that states the ombudsman was an attorney by noting that the claimant was assisted by an ombudsman at the hearing.

It is undisputed that the claimant worked as a "network technician" installing and maintaining electronic telecommunications equipment indoors as well as outdoors. It is also undisputed that on _____, the claimant had attended a meeting in the employer's office and was enroute on a service call when the employer's vehicle broke down. The claimant testified that he guided the vehicle off the road to an access area and called his supervisor who directed him to stay with the vehicle until a tow truck could be sent. The claimant testified that while waiting in a grassy area he felt something bite him on the left leg. The claimant testified that later that evening his leg began to itch and ache. The claimant said that the bites continued to worsen and he went to a clinic on July 3, 2008. The July 3, 2008, clinic note records a complaint "(L) leg 'insect bites' (X4) (+) swelling" plus "clear discharge" and "pruritic" (itching). The claimant was eventually hospitalized for cellulitis (infection of a lesion) and a staph infection.

It is clear from the Background Information that the hearing officer believed the claimant sustained an insect bite on _____, while waiting in a grassy area. However, the hearing officer further commented, that the "[c]laimant's employment as an on-call technician did not place him at a higher risk of exposure than the general public to insects and other venomous creatures that inhabit high grass and other brushy areas."

Section 401.011(12) provides in pertinent part that “course and scope of employment” means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer, and that the term includes an activity conducted on the premises of the employer or at other locations. In Deatherage v. International Insurance Company, 615 S.W.2d 181,182 (Tex. 1981), the court stated:

[a]s a general rule, a claimant must meet two requirements: (1) the injury must have occurred while the employee was engaged in or about the furtherance of the employer’s affairs or business; and (2) the claimant must show that the injury was of a kind and character that had to do with and originated in the employer’s work, trade, business or profession.

Section 406.032 provides, in part, 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 Travelers Insurance Company v. Williams, 378 S.W.2d 110 (Tex. Civ. App.-Amarillo 1964, writ ref’d n.r.e.), the court held that a wasp sting is not an act of God within the workers’ compensation statute. The employee, in that case, was a forklift operator, and in the process of operating the forklift, he was stung by a wasp on his ankle and he died the next day of an acute coronary occlusion. The court held that a wasp sting is not an act of God, therefore, the trial court did not err in refusing to submit an issue to the jury as to whether the deceased employee was exposed to a greater hazard in his employment than ordinarily applies to the general public. The court held that it was evident that the injury was sustained while the deceased employee was engaged in his employer’s business. On the question of whether the injury was of a kind and character that had to do with and originated in the employer’s work, trade or business, the court noted that there was evidence that wasps were commonly seen about the employer’s premises, that other employees had been stung by wasps while on the same job, and that the deceased employee was stung while in the actual performance of his duties. The court held that it was clear that the wasp sting was a risk or hazard of the deceased employee’s employment and was compensable. See *also* Appeals Panel Decision (APD) 951583, decided November 9, 1995.

In Standard Fire Insurance Company v. Cuellar, 468 S.W.2d 880 (Tex. Civ. App.-San Antonio 1971, writ ref’d n.r.e.) the injury resulted from an insect sting received by a furniture store truck driver while he was returning from a delivery in the employer’s truck with the window rolled down on a warm day. The court stated that an insect bite alone is insufficient to show that the employee was injured while engaged in or about the furtherance of his employer’s business, without a showing that the employee’s injury was of such kind and character as had to do with and originated in the employer’s work, trade, business or profession. The court then stated that the evidence established that the insect bite sustained by the employee resulted from the effort on his part to discharge in an orderly way the duties of his employment, that he was stung while in the performance of his duties of employment, and that he was subjected to this risk by

carrying out his designated duties. The court held that it was clear that the insect sting was a risk or hazard of the employee's employment and was compensable, citing Indemnity Insurance Co. of North America v. Garsee, 54 S.W.2d 817 (Tex. Civ. App-Beaumont 1932, no writ) and Travelers Insurance Company v. Williams, *supra*. See *also* Texas Workers' Compensation Insurance Fund v. Simon, 980 S.W.2d 730 (Tex. Civ. App.-San Antonio 1998, no writ), holding the claimant must prove that the conditions and obligations of the employment placed the injured employee in harm's way.

Under the facts of the case before us, the evidence established that while enroute to a job, the employer's vehicle became disabled, and the claimant was instructed to remain with the vehicle until help came. In doing so the claimant sustained insect bites while waiting in a grassy area. The claimant while in the orderly performance of his duties was directed to stay with the disabled company vehicle and was stung in the performance of those duties; therefore, he was subjected to the risk by carrying out those duties.

The carrier contends that the claimant failed to meet his burden of proof that he was bitten by a brown recluse spider, citing the habits of the brown recluse spider. The claimant made clear that he did not know what bit him and it was someone at the hospital that suggested the bite may have been a brown recluse spider. The Appeals Panel in APD 021666, decided August 19, 2002, involving a maintenance worker operating a weedeater when he felt a sting on his leg, commented that Appeals Panel decisions do not require the injured worker to identify the particular creature that stung or bit him.

Accordingly, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury on _____, and we render a new decision that the claimant did sustain a compensable injury on _____.

We also note that although the hearing officer had determined the claimant had not sustained a compensable injury, the hearing officer's order stated "[c]laimant remains entitled to medical benefits for the compensable injury in accordance with § 408.021." Because we have reversed the hearing officer's determination that the claimant did not sustain a compensable injury on _____, and have rendered a new decision that the claimant had sustained a compensable injury on _____, we also enter a new order that the carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A CSC – LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge