APPEAL NO. 93444

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On May 3, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be determined at the CCH was: Did GM's death occur in the course and scope of his employment? The hearing officer determined that the deceased's death occurred in the course and scope of his employment. Appellant, (District herein), contends that the hearing officer erred in admitting certain documentary evidence and "arbitrarily failing to consider substantial evidence offered" by the District. The District requests that we reverse the hearing officer's decision and remand for another CCH. The respondents, beneficiaries of the deceased (claimants herein), respond that the decision is supported by the evidence and request that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The facts in this case are relatively simple. Deceased was a "stationary" security guard employed by the District to guard certain schools in the District. On December 15, 1992, the deceased was assigned to guard a particular school where there had been an electrical fire the previous week. Security guards, including deceased on this occasion, were not allowed to enter the school buildings because of the alarm systems. It was standard and approved practice for security guards to make rounds and then watch and wait in their car until it was time to conduct another round. The testimony of deceased's supervisor, (Lt. C) was that the night of December 15th was "very cold" with the temperature 26° to 28° Fahrenheit. A dispatcher, who regularly calls at midnight and at 4:00 a.m., heard from the deceased at midnight but got no response at 4:00 a.m. Lt. C was notified and went to investigate. Lt. C testified that when he got to the school where the deceased was stationed, the gate was open and deceased's car was positioned where it was facing the school. Lt. C testified deceased's front car windows were "icy" except for a small space directly in front of where the deceased was sitting. Lt. C stated when he arrived the car engine was off but the keys were in the ignition, with the deceased sitting in the driver's seat with his head bent forward. Lt. C stated he called the dispatcher and asked him to call the deceased to ensure the radio was working, which it was. Lt. C stated that the deceased's body was "cold," that there was a blanket around the deceased's waist, that the car interior was "warm" and that there was a space heater which was turned on, on the passenger side floor. Lt. C stated be called emergency medical services (EMS) and began cardiopulmonary resuscitation (CPR) but that deceased was pronounced dead on arrival at the hospital. It appears undisputed that deceased died of carbon monoxide poisoning.

Lt. C testified the District does not provide heat for "stationary guards" such as deceased and that most guards, on cold nights, would return to their cars and turn on the car heater. He further testified that a security guard could make his "round" of the school where deceased was assigned in "10-15 minutes" and that the guards were required to

make rounds twice an hour. Lt. C testified in the "three or four" years he had been supervising the deceased he had found deceased asleep on the job four times, one of which had been in deceased's car.

Deceased's wife, one of the claimants, testified that until the past year the deceased had taken a comforter to keep him warm and had used the car heater. She testified that deceased had told her that he was getting so cold that his feet would get numb. This claimant stated that deceased had gotten a space heater, which he had used on a previous job, out of the attic to use on very cold nights. This claimant testified that she saw no warning on the heater, on the box it came in, or inside the box, and that she thought the heater was safe because she figured the deceased knew what he was doing.

The heater in question was a "BernzOmatic Flameless Propane Radiant Heater" (heater hereafter) which was advertised as "instant lighting" and "safe portable heat . . . anywhere." Two of claimant's exhibits, admitted over the District's objection, indicated that the subject heaters had been recalled with a caution that continued use in an unventilated area could lead to carbon monoxide poisoning.

The District called as a witness (Mr. GC), a safety specialist with the District, who testified as an expert witness regarding his knowledge of carbon monoxide poisoning.

Claimants submitted several exhibits regarding carbon monoxide, a toxicology text, and a medical journal which were objected to by the District on the basis of hearsay, lack of opportunity to cross-examine, an inability to test the accuracy of the statements and generally that they had not been properly authenticated. The hearing officer overruled the objections, admitted the documents and stated she would accord them the proper weight.

Claimants' theory is that the deceased on arriving at his station turned on the heater and began making his rounds. Each round would take 10 minutes and then deceased would sit in the car 20 minutes gradually absorbing the carbon monoxide fumes from the heater. Both the literature and the District's expert agreed that carbon monoxide is a colorless, odorless gas that may cause headaches and dizziness among other symptoms and competes with oxygen for binding sites on the hemoglobin molecule, and because carbon monoxide has an affinity for hemoglobin 240 or 250 times that of oxygen it remains in the blood stream for a period of time. Under claimants' theory, each time deceased walked his round he dissipated some, but not all, the carbon monoxide accumulation, followed by 20 minutes more exposure to the carbon monoxide. Claimant theorized this continued until the deceased was overcome by the fumes, lost consciousness and eventually died.

The District advances its theory that after arriving on site, and after perhaps walking some rounds and responding to the midnight call from the dispatcher, the deceased made

himself comfortable by wrapping himself in his blanket, turned on the heater, took a nap and was subsequently overcome by the carbon monoxide while he was asleep on the job and hence not in the course and scope of his employment. Parenthetically we note that even if the District's theory is correct, being asleep may, or may not, have amounted to taking the deceased out of the course and scope of his employment.

The hearing officer, obviously believing some variation of claimant's theory, found that the deceased, while performing duties for his employer, succumbed to carbon monoxide poisoning and that deceased's death occurred in the course and scope of his employment.

The District appeals on two grounds: (1) that the hearing officer erred in admitting certain of claimant's exhibits over its objections and (2) that the hearing officer "erred by arbitrary failing to consider substantial evidence offered by appellant [District]."

As to the first ground, the District objected to the admission of the deceased's autopsy report and death certificate (Claimant's Exhibits B and C) on the basis that they were not sworn to nor authenticated in any way. Parenthetically, we note that neither the District, nor anyone else, contends that deceased died from anything other than carbon monoxide poisoning, nor was the fact of death itself disputed. Claimant's Exhibits H and I are excerpts of a "Material Safety Data Sheet" on carbon monoxide and excerpts from two Consumer Product Safety Commission newsletters. Again, we note that the District is not contesting the contents or information in this material, but rather only that they were not authenticated nor "sworn to." Claimants objected to Exhibits K and L which are excerpts of medical journal articles dealing with carbon monoxide. Claimant's Exhibit J is a copy of a letter claimants' attorney (actually his secretary) received from the manufacturer of the BernzOmatic heater stating the heaters had been recalled and urging that the heater not be used. Article 8308-6.34(4) states that the hearing officer shall "(4) accept documents and other tangible evidence" and section 6.34(e) provides "conformity to legal rules of evidence is not necessary." *Also see* Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1992. Contrary to the District's contentions, the hearing officer might consider both the autopsy report and death certificates to be "written reports signed by a health care provider" within the meaning of Section 6.34(e). Even were this not the case, the hearing officer could still accept these documents as "written statements signed by a witness." We also point out that under section 6.34(e), the hearing officer "is the sole judge of the relevancy and materiality of the evidence. . . ." Regarding the other documentary evidence, the Commission Rules (Texas W. C. Comm'n, 28 TEX. ADMIN. CODE) give hearing officers broad latitude regarding what evidence he or she may allow. Rule 142.8 allows the hearing officer to admit summaries of evidence and medical reports among other items. Rule 142.12 defines evidence as "[t]estimony or documents, including books, papers, and tangible things." We would again note that nowhere does the District assert the contents of the objected to documents are in error, misleading or inaccurate.

District's only objection is that they constitute hearsay because they did not comply with evidentiary rules for authentication and being under oath. Again, we would note that neither the legal rules of evidence nor the Texas Administrative Procedure and Texas Register Act (APTRA) apply in workers' compensation hearings. For the reasons stated, we find the District's contention on this point without merit.

The District's second contention of error is that the hearing officer allegedly failed to give more weight to its witness and evidence. First of all, we have many times cited Article 8308-6.34(e) that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility to be given the evidence. Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993, Texas Workers' Compensation Commission Appeal No. 93144, decided April 12, 1993, and many others.

District contends that the hearing officer "arbitrarily failed to consider the expert testimony of [its witness] that [deceased] fell asleep before being overcome by the carbon monoxide." The District's witness opined that is what may have happened; however, as is plainly evident, no one knows exactly what happened. There is nothing in the record to indicate either that the District's witness was not a credible witness or that the hearing officer failed to carefully consider what he had to say. We note that Mr. GC, the expert witness, did not disagree with anything stated in claimants' journals and articles but merely chose to interpret that information differently than claimants' version. The fact that the hearing officer did not agree with Mr. GC's conclusions neither means that his testimony was "arbitrary," ignored, or found "not credible." It only means that the hearing officer did not agree with the District's theory. Both the claimant and the District offered different scenarios of what may have happened. Where the hearing officer has several alternatives available when presented with conflicting evidence, he or she may believe one witness and disbelieve others and may resolve any of the inconsistencies. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The hearing officer is not required to comment or explain why she rejected the District's theory as enunciated by the witness. Article 8308-6.34(g) only requires that the hearing officer issue a written decision that includes findings of fact and conclusions of law and does not require further comment. We find that the hearing officer's decision is supported by sufficient evidence and she did not err by failing to explain or comment on why she rejected District's theory. We find the District's contention that failure to comment "is arbitrary as a matter of law" is without merit.

In sum, we find that the hearing officer's decision was based on sufficient evidence and that she did not err in admitting claimants' exhibits. Unless the findings, conclusions, and decision of the hearing officer are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, there is no basis in law to disturb that determination. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge