

APPEAL NO. 93775

On June 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to resolve the sole disputed issue between the parties, namely, whether the deceased, employee JT, suffered a compensable fatal injury on (date of injury), in the course and scope of his employment with (employer), also known as (employer). The hearing officer determined that the deceased did not sustain a compensable fatal injury, because he was outside the course and scope of employment when the injuries were sustained, and further because he was injured as a result of his willful attempt to unlawfully injure a third person within the meaning of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.02(2) (recodified as TEX. LAB. CODE § 406.032(1)(B)) (hereinafter 1989 Act). The carrier was discharged from liability to the deceased's legal beneficiaries, who were the claimants.

The claimants, who are the surviving widow and minor child of the deceased, appealed, urging that the great weight of the evidence was against the hearing officer's determination that the deceased was outside the course and scope of employment when he was injured. The carrier responded that there is sufficient evidence to support the challenged findings, but also stated that claimants' request for review was not timely filed and should be denied for that reason alone.

DECISION

Finding that claimants' request for review was not timely filed, the decision of the hearing officer has become final.

The 1989 Act, Section 410.202 (formerly Article 8308-6.41), provides in part that to appeal a decision of a hearing officer, "[a] party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party." See *also* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

The Decision and Order of the hearing officer was transmitted directly to claimants by a letter dated July 27, 1993, from the Hearings and Review Division of the Texas Workers' Compensation Commission (Commission), and was actually distributed to the parties on July 29, 1993. Regrettably, the copy to claimants' attorney was mailed to an erroneous address at the same time. It was subsequently mailed to the attorney at his correct address and, according to him, in the request for review, was received on August 16, 1993. There is no contention that the decision was not mailed to the claimants at the correct address furnished. The claimants' certificate of service indicated that they served a copy of the appeal on the carrier, but not the carrier's attorney.

In its response, the respondent essentially argues that because respondent's attorney did not receive a copy of the appeal, that claimants' request is barred and the Appeals Panel has no jurisdiction. Failure to serve respondent does not affect the

timeliness of an appeal, however. See Texas Workers' Compensation Commission Appeal No. 92051, decided April 30, 1992. The reason that our jurisdiction is not invoked in this case is because the appeal was not filed within the time limits provided by the statute. Texas Workers' Compensation Commission Rule 102.4, having to do with filing documents with claimant's representatives, provides as follows:

- (a) All notices, reports, and written communications to a claimant (who is either an employee, an employee's legal beneficiary, or a subclaimant) shall be mailed to the last address supplied, either on the employer's first notice of injury, any claim form filed by the claimant, or by a claimant's letter.
- (b) After the insurance carrier or the commission is notified in writing that a claimant is represented by an attorney or other representative, all copies of notices and reports to the claimant will be thereafter mailed to the representative and the claimant, unless the claimant requests delivery to the representative only. However, copies of settlements, notices setting benefit review conferences and hearings, and orders of the commission shall be sent to the claimant by the commission.

Since the statute gives the party, not the representative, the right to appeal, and provides the party, not the representative, with 15 days in which to file an appeal, and since Rule 102.4(b) requires that Commission orders be sent to claimants, the operative date for determining the timeliness of this appeal is the date claimants, not their representative, received the Commission's decision. Texas Workers' Compensation Commission Appeal No. 92219, decided July 15, 1992, and Texas Workers' Compensation Commission Appeal No. 93327, decided June 3, 1993. Rule 102.5(h) provides that "[f]or purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed." Since the Commission's letter transmitting the decision and appeals fact sheet to claimants was distributed on July 29, 1993, it is deemed to have been received five days later, namely, on August 3, 1993. Claimants' deadline for filing their appeal was 15 days from that date or August 18, 1993. Claimants' request for review was dated August 30th, sent by Federal Express, and received by the Commission on August 31, 1993. It thus was clearly untimely and failed to invoke our jurisdiction. Pursuant to Section 410.169, the decision of the hearing officer became final. See Texas Workers' Compensation Commission Appeal No. 92080 decided April 14, 1992.

We have reviewed the evidence to determine its sufficiency to support the challenged findings had we been required to decide this case and are satisfied that claimants have not been denied benefits to which they might otherwise be entitled. There is no doubt that the case is a tragic one. However, the matters to be determined were issues of fact for the hearing officer. The evidence is sufficient and the challenged findings are not so against

the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The deceased died on (date of injury), as a result of a blow or blows to the head apparently resulting from kicks by his supervisor, (Mr. H), after the deceased pulled a gun on Mr. H. The events leading up to this event were described by Mr. H and set out in the hearings decision. Mr. H stated that the deceased had worked for him for 21 months prior to the incident, and that he had had no fights with deceased prior to the early morning of (date of injury). On that date, Mr. H said he walked around the job site with the deceased and another worker, (Mr. G), before they were to begin a grading project. Mr. H said that he asked the deceased, in a normal tone of voice, to run a service check on some equipment they would be using that morning. The deceased, according to Mr. H, said something to effect, "do you mean to tell me those sons of bitches didn't do this before they left the place yesterday?" Mr. H stated that the deceased slammed a truck door shut and began walking toward him. Mr. H stated that deceased walked past him and brushed his shoulder, uttering words to the effect that he was sick of the "goddamn bullshit." Mr. H said he thought the deceased was going to hit him backhand. Mr. H turned to walk behind the deceased and when deceased walked passed him, he turned and pulled a gun, described as a "38," and said that he was going to end the "goddamn bullshit" right now. Mr. H stated that deceased pushed the gun toward his stomach and was pulling the trigger. Mr. H said he grabbed deceased's hand and the gun began coming up toward his face. Mr. H stated that he was scared and defecated and he was pushed up against a truck by deceased during this incident.

Mr. H yelled for Mr. G to come, and Mr. G ran up and disarmed the deceased, and went back toward his truck. Mr. H stated that he backed away from the deceased, who was still threatening. Mr. H recalled that he ended up on the ground, and then knocked the deceased down with blows to the upper body. Mr. H stated that he kicked the deceased in the head. Mr. H recalled at least one and possibly two other kicking incidents in which the deceased kept trying to rise, uttering threats, and Mr. H's thought was to keep him down. In between two of these incidents, Mr. H ran to his truck and called for the police on his portable telephone, which Mr. G did not know how to use. Mr. H stated that before the last kicking incident, the deceased began to rise while reaching toward his pants, and that Mr. H thought he could have another weapon. Mr. H stated that his primary emotion was fear, and he was not angry with the deceased, but felt in fear for his life.

Mr. H stated he was 30 years old at the time of the incident. The deceased was approximately 60 years old. Mr. H and Mr. G testified that the two men were approximately the same size. Mr. H stated that he was aware of one other physical encounter involving deceased, in which he struck a coworker. However, Mr. H indicated that this was "hearsay" and he did not have personal knowledge of the incident nor did he do an investigation. Mr.

H stated that he was not wearing steel-toed boots but was wearing new work boots.

Mr. G stated that he did not recall hearing Mr. H yell at or threaten the deceased at any time. Mr. G testified to his impression that deceased had the gun in Mr. H's stomach, and was pulling the trigger. Mr. G said he had to forcibly disarm deceased when summoned by Mr. H, and he agreed with the account of the threatening language by the deceased. After he took the gun back to his truck, he heard threatening language again from deceased, and saw Mr. H on the ground. Mr. G agreed that Mr. H kicked deceased in the head. He stated that when Mr. H came to use the portable phone, he stated that he intended to "press charges," but did not recall that Mr. H was angry. He did recall that Mr. H was scared. Mr. G stated that he did not intervene because he did not get involved in other people's fights. Mr. G testified that the whole sequence of events had been pretty quick.

In a transcribed statement given by Mr. G on September 16, 1991, he said that after he first saw Mr. H on the ground, Mr. H and deceased began throwing punches at each other before deceased was knocked to the ground, at which point Mr. H began kicking deceased.

There was testimony as well from a previous employer of the deceased who stated that the deceased had once rammed his truck when he became angered after a discussion about the job. He fired deceased for this incident but later rehired him. He fired deceased a second time after an altercation involving a county inspector in which a gun was pulled.

A signed statement from (Ms. C), an employee of this prior employer, stated that after the altercation with the inspector, she joked with the deceased and he became upset and threw hot coffee in her face and then hit her in the head. Ms. C's statement says that the deceased would get upset and threaten to kill people all the time.

Another coworker, (Mr. A), who was not on scene on (date of injury), but in the main "shop," testified that he knew deceased carried a gun at work and that he had seen it. Mr. A stated that deceased had once bragged about killing a man. He stated that he tried to stay out of the deceased's "mix" because he would get upset easily, and that he was scared of deceased. Mr. A stated that the day of the incident, Mr. H called the shop twice, requesting first an ambulance and then the police. He stated that Mr. H sounded scared both times.

Mr. H was called as an adverse witness by the claimant, and referred during his testimony to a criminal proceeding. After his testimony, the carrier indicated that he would want to call Mr. H on rebuttal, and claimant objected. A discussion ensued about the purpose of the testimony, and the hearing officer commented that he did not regard the outcome of any criminal proceeding as relevant. However, claimant's attorney stated that

he would "stipulate" that Mr. H had been acquitted, to which the carrier's attorney replied "Fine."

The deceased's death certificate listed the cause of death as "[f]racture of the skull, maxilla and nose due to multiple blunt trauma to the head."

The essence of the task for the hearing officer at the close of the evidence was to sift through the testimony and other evidence and resolve the conflicts. The hearing officer, as the finder of fact, was charged with the sole responsibility for judging the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). Were we required to decide this case, we would not substitute our judgment for that of the hearing officer where the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ).

The appeal not having been timely filed, the decision of the hearing officer is final. See Section 410.169; Rule 142.16(f).

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge