APPEAL NO. 950020
FILED FEBRUARY 17, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 2, 1994. With respect to the issues before her, the hearing officer determined that (deceased) death on _____, was a result of an act of God; that on _____, the nature of deceased employment with the employer exposed him to greater risk of being struck by lightning than the risk which would be encountered by a member of the general public; that on _____, that (claimants), parents of the deceased, were dependent upon the deceased; and that the deceased average weekly wage was $518.88. The appellant (carrier) appealed requesting that we reverse and render a decision that there was not a compensable death and that the claimants were not dependent on their son and arguing that the employment of the deceased did not place him at a greater risk of being struck by lightning than the risks encountered by the general public. The claimants responded urging that the determinations of the hearing officer are supported by sufficient evidence.

DECISION

We affirm.

On July 13, 1994, the employer had several crews working in various states of installing a pipeline. At the starting point, where sections of pipe were being joined, there was a thunderstorm with lightning and rain. Employees at the starting point observed lightning strike power lines; an employee fell from a piece of equipment and may have been struck by lightning; and work was stopped. The location where the deceased was working when he was struck by lightning was about four or five miles from this starting point. The crew at that location was preparing the right of way so that other crews could perform their duties. The crew was removing weeds and grass in an open field, and the deceased was standing near a steel valve to make sure that the bulldozer operator did not strike the valve. At this location it was cloudy and hazy, but it was not raining. The thunderstorm near the starting point could be seen from this location.

The deceased's father was the foreman of the crew clearing the right of way. He testified that his son was wearing a hard hat and standing near a valve on a pipeline with a bulldozer in the vicinity when he was struck by lightning. He said that he later learned that another employee was struck by lightning earlier that day at the starting point, was taken to the hospital, but was not injured. He testified that about one week later two other workers were struck by lightning about one-half mile from the location where his son was struck. He said that the other workers were on or near heavy equipment when they were struck by lightning.

The deceased was 21 years old at the time of his death. He had been a very busy person. He had been a part-time college student and had attended classes at night. When he was not attending college, he attempted to work at jobs such as the one he had at the time he was struck by lightning. The claimants and their son were involved in the horse business. They would buy horses, the son would train the horses, and they would sell the horses, hopefully for a profit as the result of increased value because of the training of the horses by the son. Almost every weekend the son showed horses in shows in Texas and as far away as North Carolina and Tennessee in an effort to have the horses win points that would increase their value. The claimants and their son shared a bank account. The father deposited his paychecks, and check for unemployment compensation when he did not work, in the bank account. When the son worked outside the family horse business, he would deposit his paycheck in the bank account. The mother did not work outside the home or in the family horse business until after her son was killed. Each of the three family members could withdraw funds from the account. Decisions to buy and sell horses were family decisions and were not made by one person. The family has about 50 acres of land. The son did general work around the house and the farm including mowing around the house and barn; mowing the pastures; mowing, baling, and hauling hay; and performing maintenance on the house and vehicles.

Ms. K, the mother of the deceased, testified that she did most of the recordkeeping for the family. Concerning the family horse operation, she said that they usually sold horses for more then they paid for them but sometimes sold a horse for what they paid for it. She testified to the purchase price and sale price of several horses. The claimants introduced documents showing what they paid for horses and the sales prices of the horses when they sold them. She testified that in 1994, up until the time of the death of their son, the monthly average for net resources available to the family was about $3,728. The claimants introduced documents to show that their son earned $2,288 outside the family horse business in 1994. The claimants also introduced an estimate from a horse trainer stating that the charge for training a horse would be $575 per month. Ms. K testified that they have 12 horses, that they sometimes have as many as 16 horses, that some horses are young and are not trained at a young age. She said that they are not able to afford to pay someone to train the horses.

Testimony and documents indicate that the employer paid the deceased $8.00 an hour for the first 40 hours worked per week and $12.00 per hour for each hour worked in excess of 40 hours per week. The son had worked for the employer on more than one occasion, and had only worked for the employer for a short time immediately prior to his death. When he worked for the employer, he worked about 60 or 70 hours per week.

We first address the issue of the compensability of the lightning strike. Section 406.032 provides in part:

An insurance carrier is not liable for compensation if:

> (1) the injury
>
> > (E) 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;
>
> * * * *

Research by the hearing officer and this panel located several cases that are helpful in resolving the compensability issue. A Missouri appellate court affirmed the decision of a trial court finding a death to be compensable where the person was standing in an open wheat field next to another man and several vehicles. The general terrain was flat, and several other employees were in the vehicles. The court stated that the employment exposed the decedent to a greater risk of being struck by lightning than the public generally. Reich v. A. Reich & Sons Gardens, Inc., 485 S.W.2d 133 (Mo. App. 1972). Professor Larson, in his discussion of acts of God and lightning strikes, states: "Generally, courts take judicial notice that lightning is attracted to high places and structures, such as hilltops, scaffolds, roofs, and even the height of a human being projecting above an open level surface." Vol. 1, Larson, The Law of Workmen's Compensation Law, § 8.11(a), page 3-16 (Matthew Bender 1994).

Texas appellate courts affirmed the compensability of injury from lightning strikes as early as 1926. United States Fidelity & Guarantee Co. v. Rochester, 281 S.W.2 306 (Tex. Civ. App.-Fort Worth 1926), aff'd 283 S.W. 135 (Tex. 1926). In that case, men were about 20 feet apart removing dirt from a pipeline in flat, open country. There was a cloud a considerable distance from them, but there was no evidence of any lightning or a rainstorm in the vicinity. Suddenly, and without any warning, a bolt of lightning struck Mr. R resulting in his death. There was testimony that a man standing over a steel pipeline or near a pipeline with a steel shovel in his hand would be in a more a dangerous position than if he was standing away from the pipeline and did not have a shovel in his hand. When addressing the issue of unusual risks, the court of appeals quoting from a New York case wrote at page 311:

> We think that, as the result of the judicial knowledge, which may be taken of scientific facts, the Industrial Board was permitted, without expert evidence, to find as it did by implication, and that we are permitted to say that he was.

The Court of Civil Appeals of Texas went on to write:

> It is to be observed that in the case before us there is a distinct finding by both the Accident Board and the jury, to the effect that the deceased at the

> time of his injury "was engaged in the performance of duties that subjected him to greater hazard from the act of God, responsible for the injury, than ordinarily applies to the general public. And this finding, under the authorities and under well-recognized rules that we follow, cannot, we think, be said to be unsupported by the evidence, or set aside.

Another Court of Civil Appeals of Texas affirmed the trial court's finding of a compensable injury in a case involving a lightning strike where the rainstorm was observed but had not reached the location of the lightning strike. State Highway Department of Texas v. Kloppenberg, 371 S.W.2d 793 (Tex. Civ. App.-Houston, 1963, writ ref'd, n.r.e.). The worker who was struck by lightning was working near a steel and concrete bridge that spanned a narrow river. The person was drilling a hole in the eighth post away from the bridge on the approach to the bridge so that a reflector could be placed on the post. He was wet from perspiration, but the rainstorm had not reached where he was working. The claimant introduced evidence concerning the nature and behavior of lightning and about materials that especially attract lightning. The court found the evidence to be sufficient to support the trial court's finding that the work of the injured worker subjected him to a greater hazard from lightning than the ordinary public. The court cited Rochester discussed above; Traders & General Insurance Company v. Pool, 105 S.W.2d 492 (Tex. Civ. App.-Amarillo 1937, writ dism'd); and 16 Texas Law Review 131. In the Pool case, the deceased was at a location where a well was being drilled, the drilling had stopped because of the weather, and the deceased was standing in the open near a tent when he was struck by lightning.

While in the case before us expert evidence on lightning strikes was not adduced as was done in the two cases discussed above, there is evidence that the deceased was standing in an open field near a steel valve of an existing pipeline and that a bulldozer was in the vicinity. In her discussion, the hearing officer noted the lack of comparison of the risk of the deceased in his work environment being struck by lightning and the risk of the general public being struck by lightning. The hearing officer cited Texas Workers' Compensation Commission Appeal No. 93032, decided February 26, 1993, stating that the extra hazard associated with the employment may be established by the general nature of the work itself. Appeal No. 93032, *supra*, involved heat exhaustion and there the author judge cites a case using the phrase "act of God" and a case stating that the extra hazard may be supplied by evidence of the nature of the work itself. In the case before us, the work placed the deceased near a steel valve on a pipeline in an open field and in the vicinity of a bulldozer. Considering Appeal No. 93032, *supra*, and the comments concerning judicial knowledge taken without expert evidence in United States Fidelity & Guaranty Co. v. Rochester, *supra*, the hearing officer was permitted to make inferences and draw conclusions.

As a general rule, the party claiming compensation because he or she is exposed to risks or hazards greater than those to which the general public is exposed, has the burden

of proving the extra hazards. Weicher v. Insurance Company of North America, 434 S.W.2d 104 (Tex. 1968). The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). A hearing officer is permitted to draw inferences and deductions from the evidence. Harrison v. Harrison, 597 S.W.2d 477 (Rex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for sufficiency of the evidence, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence to be clearly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The deceased was standing near a valve on a pipeline in close proximity to a bulldozer in an open field. As the hearing officer aptly noted in her discussion, more evidence concerning the comparative risks of the deceased and the general public being struck by lightning could have been presented at the hearing; nonetheless, the evidence is sufficient to support her determinations that on _____, the nature of the deceased employment exposed him to a greater risk of being struck by lightning than the risk which would be encountered by a member of the general public and that the death of the deceased is compensable under the 1989 Act.

We next address the sufficiency of the evidence to support the determination that the claimants were dependent on their son on _____. Before looking to the evidence itself, we address an evidentiary issue. At the hearing the carrier objected to the introduction of some documents offered on the issue of dependency on the grounds that they were not timely exchanged and that they were not relevant. Many of the exhibits offered by the claimant were not obtained until shortly before the hearing, and the record does not reveal the efforts of the claimants to obtain the records earlier. The record reveals two dates of exchange in November 1994, but it is not clear precisely which documents were included in each exchange. The hearing officer found the documents related to the family horse business to be relevant and that good cause existed for the late exchange of the exhibits. Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary on the part of the hearing officer. Texas Workers' Compensation Commission Appeal No. 95816, decided August 10, 1994. The standard of review on such evidentiary issues is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). We do not find that the hearing officer abused her discretion in admitting the documents.

The 1989 Act and the Commission Rules set forth requirements that must be met before surviving parents may receive death benefits. The dispute in this case centers on whether or not the parents were dependent on their son on _____. The hearing officer found that they were. Under the 1989 Act a "dependent" is an individual who receives a regular or recurring economic benefit which contributes substantially to the individual's welfare and livelihood if the individual is eligible for distribution of benefits. Rule 132.2 provides guidance on determining whether a person is a dependent. The rule provides in part:

> (b) A benefit which flowed from the deceased employee, at the time of death, on an established basis in at least monthly intervals to the person claiming to be dependent, is presumed to be a regular or recurring economic benefit . . .
>
> (c) It shall be presumed that an economic benefit, whose value was equal to or greater than 20% of the persons's net resources in the period for which the benefit was paid, is an economic benefit which contributed substantially to the person's welfare and livelihood. This presumption may be overcome by credible evidence. The burden is on the claimant to prove that benefits whose value was less than 20% of the person's net resources contributed significantly to the person's welfare and livelihood.
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> (d) Net resources . . . are 100% of all wage and salary income and all other income including nonpecuniary income and all income from the individual's spouse, less 10% of social security taxes and federal income tax withholding.

The hearing officer noted that the family's net monthly resources averaged $3,728 in 1994. She noted that the son was training several horses, and that if he trained only two horses his monthly contribution from that activity would be $750 per horse or $1,050. She noted that the total resources would be $5,230, that 20% of that would be $1,046, and that the $1,050 from training two horse alone exceeds the 20% requirement. She went on to state that the son made other contributions that could be considered under the precedent in Texas Workers' Compensation Commission Appeal No. 93822, decided October 26, 1993. The hearing officer based her discussion on documents in evidence and on testimony of the claimants. The evidence is sufficient to support the determination that on _____, the claimants were dependent on their son.

Finding the evidence sufficient to support the determinations of the hearing officer and no reversible error, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge