APPEAL NO. 990868

A contested case hearing (CCH) was originally held in (City 1), Texas, on July 22, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with (hearing officer) presiding as hearing officer. In Texas Workers' Compensation Commission Appeal No. 981925, decided September 25, 1998, the Appeals Panel reversed the decision of the hearing officer and remanded to the hearing officer for analysis regarding the affect of the employer's payment of an automobile allowance, and analysis regarding the deceased's activity when he expired. The hearing officer convened another hearing on February 23, 1999, and rendered another decision on March 5, 1999. He made the following findings of fact and conclusion of law:

FINDINGS OF FACT

4. After completing work on the job site in [city 2], Texas on (a day before the date of injury) [deceased] went to a friend's house. At about 8:30 p.m. [deceased] left [city 2] and drove his personal truck with the Employer's trailer toward his residence in [city 3], Texas.

5. Employer paid [deceased] an automobile allowance as part of his compensation. [Deceased] regularly drove to the Employer's job sites, and towed the trailer to such site at the beginning of the job, and towed the trailer away from the site at the conclusion of the job. [Deceased] stored the trailer at his residence in [city 3], Texas between jobs. [Deceased] moving the trailer from the job site to his residence in [city 3], Texas had become an implied part of his contract for hire with Employer.

6. On the way from [city 2] to [city 3] on (a day before the date of injury), [deceased's] truck broke down. [Deceased] parked in a parking lot and attempted to repair the truck. [Deceased] may have used tools and equipment belonging to Employer and entered the trailer attempting to repair his truck. [Deceased's] repair of the truck was an incident to moving the trailer from [city 2] to its storage place in [city 3].

7. [Deceased] was found dead in the trailer the next day. The death certificate listed the cause of death as asphyxiation from carbon monoxide poisoning and described the decedent as lying supine on the floor of the trailer.

8. [Deceased's] death from asphyxiation was not an injury that arose from the hazards of transporting the Employer's trailer to it storage place in city 3, or from the attempt to repair the truck on the night of (a day before the date of injury) or _____.

9. There is no suggestion of suicide in the record of the case.

CONCLUSIONS OF LAW

3. Because claimant beneficiaries have not shown by a preponderance of the evidence that the deceased had injuries while engaged in an activity that furthered the business affairs of the Employer that resulted in his death on _____, the death is not compensable within the meaning of the Act.

The appellant (claimant) appeals Finding of Fact No. 8 and Conclusion of Law No. 3, and requests that we reverse and render a new decision that deceased's death is a compensable injury. The respondent (carrier) responds, urging the claimant's appeal was not timely filed, and, in the alternative, the hearing officer correctly concluded that decedent did not sustain compensable injuries on _____, which resulted in his death, and that the decision of the hearing officer be affirmed.

DECISION

Affirmed.

Pursuant to Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 143.3(c) (Rule 143.3(c)), an appeal, to be timely, must be filed or mailed not later that the 15th day after the date of receipt of the hearing officer's decision. Rule 102.5(h) provides that a claimant is deemed to have received the decision and order of the hearing officer five days after it was mailed. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed on March 15, 1999, with a cover letter of the same date to Mr. JZ, the carrier and its attorney, and the employer. The Commission records indicate that on April 14, 1999, the Commission received a telephone call from Mr. H, the attorney representing the claimant, asking about the decision of the hearing officer. The Commission records indicate that the Commission faxed and sent a copy of the decision to Mr. H on April 14, 1999. The Commission received an "Objection and Request for Review" from Mr. H on April 23, 1999. The carrier asserts that the request for review filed on April 23, 1999, is untimely and should not be considered by the Appeals Panel; that due to the claimant's failure to state when she received the decision of the hearing officer, the Appeals Panel should apply Rule 102.5(h) and the last day for filing an appeal was on April 5, 1999.

The style of the case reflects Ms. KZ as the claimant beneficiary. Ms. KZ appeared at the original CCH and the CCH on remand. While Mr. JZ and Mr. WZ, the sons of deceased, may be potential claimant beneficiaries and appear to be represented by Mr. H according to his appeal, they did not participate at either the CCH or the benefit review conference. Only Ms. KZ was sent notice of the prior proceedings and Mr. JZ was sent an "information copy." In this case, it is evident that the claimant, Ms. KZ, did not receive a

copy of the decision of the hearing officer mailed on March 15, 1999, because it was not addressed to her. While the carrier argues the address for Mr. JZ appears to be the same as that of Ms. KZ, we will not conclude that it was sufficiently addressed to Ms. KZ. Mr. H did not indicate in his appeal when, if ever, the claimant received the decision of the hearing officer; however, Mr. H's receipt of the decision was on behalf of the claimant. With the date Mr. H received the decision being April 14, 1999, the last day to timely file an appeal was April 29, 1999. The claimant's appeal was mailed on April 23, 1999, and was received by the Commission on April 26, 1999. Thus, the appeal was timely. We note that, although the claimant filed a response to the carrier's response, there is no statutory basis or rule which allows for such a response, and we will not consider it.

Many of the facts of this case are not in dispute. On _____, decedent was employed as a construction superintendent for the employer. Decedent's widow, the claimant, and the employer's president, Mr. R, agreed on the manner decedent carried forth his job duties for the employer. Decedent stayed in hotels when he traveled from city to city, for which the employer paid. One of the employer's subcontractors, Mr. Hi, provided an affidavit, wherein he stated that the employer always provided hotels for decedent to stay in. Ms. R, a restaurant employee in (city 4), Texas, gave a statement and recalled that when she visited decedent in city 4 and surrounding cities, he always stayed in a hotel. The employer did not reimburse decedent on a per-mile basis but did pay him a $500.00 per month "automobile allowance" in addition to his wages. The employer did not dictate where decedent traveled to or when, but did direct him to work on the jobs which needed to be completed. Decedent pulled the employer's horse trailer behind his own truck from job site to job site. The trailer contained construction equipment, office supplies and records. Mr. R and Mr. Hi stated that 75% of the equipment belonged to decedent. Although the trailer had been converted to some type of living quarters, decedent was not allowed to sleep in it and was not known to have ever slept in it. Mr. R said that, between jobs, decedent could leave the trailer at the job site or store it at his home. Mr. R said that repairing decedent's truck was not part of decedent's responsibilities for the employer and did not further the employer's business affairs.

A hotel receipt reflected that on April 17, 1997, decedent checked into a hotel in city 2, Texas. Based on Mr. Hi's affidavit and Mr. R's testimony, the claimant finished a job in city 2 at 5:00 p.m. on (a day before the date of injury), and went to a friend's house for refreshments. At approximately 8:30 p.m. on (a day before the date of injury), he proceeded toward his home in city 3, Texas. The claimant spoke to decedent around 11:00 p.m. that evening and he informed her that his truck broke down and it and the trailer had been towed to a grocery store parking lot in city 3, two to five miles from their home. According to the claimant, he said he had commenced repairs on his truck and tried to use a "compressor" to charge its battery. He told her he intended to proceed home when the truck was operational. After decedent's death, Mr. R spoke to the grocery store's security guard, (Officer S), regarding his observations. Officer S told Mr. R that on the evening of (a day before the date of injury), he saw decedent use a gasoline-powered generator to try to

charge his truck's battery. Officer S said he informed decedent it was all right to leave the truck and the trailer in the parking lot, as he would be providing security on the premises throughout the night.

What happened on the morning of _____, is unknown. On the afternoon of _____, decedent's dead body was found on the floor of the trailer, dressed in a tee shirt and underwear. Investigator W referred to Detective V's findings and noted the following in his April 20, 1997, report:

> The horse trailer was locked from the inside and the family had to force the door open.
>
> There were two vents on the top of the trailer that were open. There was a gas generator inside that was off and empty of gas. There were empty beer cans in the trailer.
>
> There was no prior history of drug use or suicide attempts.

The June 3, 1997, death certificate listed "asphyxia due to carbon monoxide poisoning" as the cause of decedent's death. The record does not contain an autopsy report.

At the hearing on remand, additional testimony was elicited from the claimant. The claimant testified that deceased was not depressed, nor did he ever indicate any signs that he wanted to commit suicide. The claimant testified that it was the deceased's job to pull the trailer to and from work sites and, when it was not in use, it was left at their house. According to the claimant, it was consistent for deceased to stay with the trailer and he would not have abandoned the trailer. The claimant testified that on the morning of _____, the trailer and truck were still attached.

It was the claimant's burden to prove by a preponderance of the evidence that deceased's death resulted from injuries sustained in the course and scope of employment. An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A compensable injury is "an injury that arises out of and in the course and scope of employment . . . ." Section 401.011(10). Generally, an employee is in the course and scope of employment if he engages in an activity that has to do with and originates in his work. Section 401.011(12). He is not in the course and scope while he is engaged in transportation to and from work, or "coming and going." Section 401.011(12)(A). However, if the transportation is furnished as a part of the contract of employment or under the employer's control, the transportation to and from work is in the course and scope of the employment. Section 401.011(12)(A)(i). If an exception to the coming and going rule applies, an employee must still show that he was engaging in the furtherance of his employment. Additionally, the term "course and scope of employment" does not include

"travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee . . . ." Section 401.011(12)(B). Exceptions to this "dual purpose" doctrine apply, and the travel is in the course and scope of employment, when the travel would have been made even if there were no personal affairs of the employee and would not have been made had there been no business of the employer to be furthered. *Id.*

The claimant asserts that deceased's death was a compensable injury, whether considered directly related to moving the trailer, or to the duties of a "dual purpose" for benefit of his employer. The hearing officer, after considering all of the evidence and testimony presented, determined that the death did not arise out of the hazards of transporting the employer's trailer to its storage place, or from the attempt to repair the truck. Whether or not deceased was engaged in an activity in furtherance of his employment at the time of his death was a factual determination for the hearing officer. For the "dual purpose" doctrine to apply, two prongs must be met: both the furtherance of the affairs or business of the employer and furtherance of personal or private affairs of the employee. The evidence does not support that deceased was furthering the affairs or business of the employer at the time he sustained fatal injuries. The claimant asserts that Texas Employers Ins. Ass'n v. Cobb, 118 S.W.2d 375 (Tex. Civ. App.--El Paso 1938, writ ref'd), is directly on point. In that case, the court found compensable the death of a salesman who was required to travel and, while sleeping in a tourist cabin, died of carbon monoxide poisoning. The court stated, "[a] risk is said to be incidental to the employment when it belongs to, or is connected with, what a workman or employer has to do in fulfilling his contract of service." We have held that employees whose work requires travel away from the employer's premises are in the course and scope of employment except when a distinct departure or a personal errand is shown, and have held that injuries arising out of the necessity of sleeping in hotels away from home are compensable. However, in this case, the hearing officer did not find the death sufficiently connected with the employment.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find the evidence sufficient to support the hearing officer's determination that deceased did not sustain compensable injuries on _____, which resulted in his death. This is so, even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge