APPEAL NO. 990871

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 17, 1999, a hearing was held. The hearing officer determined that the death of the deceased was not compensable. Appellant (claimant) asserts that there is no evidence that the deceased's diabetes or seizure disorder was a contributing cause of death, that the arrangement of the hotel room contributed to the injury/death, and that the deceased's death was accidental arising out of the employment while in the course and scope of employment. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We reverse and render that the deceased's death was compensable.

The deceased worked for (employer). He and other employees traveled to State 1, on May 26, 1998. Mr. K and Ms. C traveled with the deceased to State 2 to attend a series of meetings. According to Mr. K, the three went to a Hotel from the airport; there was a 2:00 p.m. meeting about 20 minutes away. They left the hotel together to go to that meeting. After the meeting was over, they ate dinner at a restaurant and then returned to the Hotel, where they were staying and where there was another meeting scheduled for the next morning. Both Mr. K and Ms. C said that the deceased said or did nothing unusual. Mr. K opined that the deceased was in better condition than he himself, stating that the deceased ran four to five miles "every morning." Mr. K stated he knew deceased was a diabetic.

The deceased's wife testified that she talked to him the night before he died at about 9:15 p.m. California time. He sounded upbeat and mentioned no problems. She said that he is a chemist, as is she, and that he took very good care of himself concerning insulin. She stated that in the 13 years she knew the deceased, he had maybe five seizures, all related to very strenuous exercise.

The deceased was found dead the next morning. According to the medical examiner's investigator, the deceased was found with his head "wedged between the bed and a nightstand." (A picture of the bed and nightstand--duly admitted in evidence--shows that the side of the nightstand away from the bed abuts a wall and that the nightstand is between six and 12 inches from the bed.) The police investigator's report also states that the "body was lying on the floor between the bed and glass coffee table"; power bars and medicine were on the table. The Certificate of Death states in blank 107 that the "immediate cause" of death was "positional asphyxia with neck compression." The certificate also said in another block labeled "other significant conditions contributing to death but not related to cause given in 107" was "diabetes mellitus with hypoglycemia and seizures." This was signed by Dr. S. Dr. S's autopsy report listed under Autopsy Summary, "evidence of positional asphyxia with neck compression," the following points: (1) pressure imprint marks of right side of neck, chest and right arm, (2) neck muscle

hemorrhages, (3) numerous skin petechiae of face, (4) multiple conjunctival petechiae, (5) general congestion of viscera, and (6) pulmonary edema. There were no matters listed which would show either a diabetic episode, seizure, or hypoglycemia, except a reference to a toxicology report. The toxicology report showed various levels of glucose, nitrogen, and other elements. There was no expert evidence interpreting these levels as anything indicative of seizures, etc, except the deceased's wife, as a chemist, testified that the glucose level was based on the fact that the deceased was dead. The same detailed report that provided the toxicology report also showed that, in addition to the very small bruises (petechiae), the deceased had a three by one and one-half inch bruise on the lateral forehead.

A focal part of the discussion at the hearing was Dr. S's comment at the end of the summary which said, "(i)t appears that he had an acute event related to his diabetes which caused him to fall off the bed into the position where he was found." The manner of death was listed as "accident." Thereafter on January 8, 1999, Dr. S said that his statement about an "acute event which caused him to fall" was an attempt to explain why the deceased was in the position found. He then said, "(t)his however, was speculative on my part . . . there was no specific pathologic or toxicologic evidence that such an event did occur," (emphasis as written) adding that the scene showed no disarray indicative of seizure. He then concluded by stating:

> I thought that the death certificate and autopsy report made it obvious that we believe [the deceased] died from positional asphyxia with neck compression which is an ACCIDENTAL cause of death. [Emphasis as written.]

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Generally, she may choose to accept, for instance, the statement of Dr. S that referred to the acute event of diabetes which caused him to fall and reject Dr. S's later explanation that such statement was speculative. In this instance, however, there was no expert evidence indicating that any toxicological evidence indicated a diabetic event and no other evidence of a diabetic event other than a history of such a diagnosis and history of rare seizures after strenuous exercise (note that claimant was said to run every day, which for him would not be strenuous, and that he was said to run every morning, not at night prior to going to bed.) Based on the evidence (counsel statements are not evidence), including the bruise on the deceased's forehead and the wedged position of the body between the bed and a nightstand, which was unable to move because it was next to a wall (which is not the same risk as the deceased would have had in his own bed), the great weight and preponderance of the evidence is against the determination that a "contributing cause" of death was diabetes, hypoglycemia, and seizures.

However, even if a "contributing cause" of this accidental death was diabetes, seizures, and hypoglycemia (such as Dr. S speculated in his autopsy summary, but in which he also said that the diabetes, etc., caused the fall), the death would still be compensable. *See* Texas Workers' Compensation Commission Appeal No. 961283, decided August 19, 1996, which said that a claimant does not need to show that something was the sole cause of injury, but it is sufficient that the incident was a "contributing cause."

Therefore, the finding of fact that the deceased's prior condition was a "contributing cause" does not sufficiently support the determination that death was not compensable. There was no argument that the deceased was not in State 2 for business or that he had departed from such purpose to embark on a personal activity of his own. The hearing officer recognized that in her Statement of Evidence and made no findings of fact that the deceased had departed from the course and scope of employment; she did find that he was in the hotel where he and others were quartered for the business trip.

See Texas Workers' Compensation Commission Appeal No. 951576, decided November 9, 1995, in which a question of whether injury "arose" in the employment was involved. That claimant was a nurse; she felt herself "getting ready to pass out" while at lunch at the hospital cafeteria. She regained consciousness in the emergency room, diagnosed with a skull fracture. Citing Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex. 1948), in which a fall was compensable that began with an epileptic seizure, General Insurance Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), in which a dizzy spell prompted a fall resulting in a fractured skull, and American General Insurance Company v. Barrett, 300 S.W.2d 358 (Tex. Civ. App.-Texarkana 1957, writ ref'd n.r.e.), the Appeals Panel affirmed the determination of compensability. *See also* Texas Workers' Compensation Commission Appeal No. 980924, decided June 22, 1998. In that case, an airline employee was staying in a hotel in another city while between flights. She sustained multiple insect bites. Citing North River Insurance Co. v. Purdy, 733 S.W.2d 630 (Tex App.-San Antonio 1987, no writ), Shelton v. Standard Insurance Co., 389 S.W.2d 290 (Tex. 1965), and Aetna Casualty & Surety Co. v. Orgon, 721 S.W.2d 572 (Tex. App.-Austin 1986, writ ref'd n.r.e.), the Appeals Panel affirmed the determination of compensability. Compare to Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995, in which an employee staying out of town at a hotel was not in the course of employment when he then traveled to another town from where he was staying to eat in a restaurant and was injured in a car accident while driving back to his hotel.

The findings of fact that state that the deceased's injury did not have as its origin the necessity to sleep away from home and which said that the injury was not due to an activity that had to do with employment are reversed.

The decision and order are reversed and a new decision and order are hereby rendered that the deceased did sustain a fatal compensable injury on May 27, 1998, while in the course and scope of employment and that carrier is liable to the deceased's

beneficiaries, consisting of claimant and the deceased's two children, Emily Marie and Jennifer Sarah.

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Joe Sebesta
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Judy L. Stephens
Appeals Judge