

APPEAL NO. 990929

A contested case hearing was held on March 17, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the four disputed issues by concluding that the death of (decedent) on _____, occurred within the course and scope of his employment; that the decedent's fatal injury was not caused by his willful attempt to injure himself; that the appellant (carrier) did not waive the right to contest the compensability of the claimed fatal injury since it contested compensability within 60 days of being notified of the fatal injury; and that the carrier did not specifically contest the compensability of the claimed fatality pursuant to Section 409.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6). The carrier has appealed the determination that the decedent's death occurred within the course and scope of employment and was not caused by his willful attempt to injure himself, asserting that the respondent (claimant beneficiary), failed to meet her burden to prove by a preponderance of the evidence that the decedent did not commit suicide once the burden of proof shifted to her. The carrier has also appealed the determination that it failed to specifically contest compensability because the verbiage on the Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) disputing the claim was too vague. The response filed by the claimant beneficiary asserts that the evidence is sufficient to support the appealed findings and conclusions.

DECISION

Affirmed in part; reversed in part.

The _____, investigative report of the Department reflected that the body of the decedent was found on that date, face down, on the fifth floor overhang or awning of the 21-story office building where he was employed as a part-time security guard. The March 24, 1997, autopsy report from the office of the (Company) stated the pathological diagnoses as crushed chest, crushed abdomen, crushed pelvis, fracture of the left tibia and fibula, and subdural and subarachnoid hemorrhage and stated the opinion that the decedent "came to his death as a result of crushed chest, abdomen, and pelvis, jump from height, suicide."

The police report stated that the decedent had checked in for his security guard duty at around 6:45 a.m. on _____; that he was reported by coworkers to have been in a jovial mood; that the police received a report from coworkers on that morning of _____, that the decedent, whose truck was parked in the building garage, was missing; that the police conducted a search of the building and failed to locate him; that in the afternoon of _____, a construction worker on a nearby building spotted the decedent's body on an overhang of the building where the decedent worked and notified the police; and that from the indentation in the overhang surface beneath the decedent's body and the condition of his body, the police investigators concluded that the decedent had fallen from the 21st floor roof. (Sgt. P) of the homicide unit, who supervised the police investigation, testified that there was no evidence of a struggle or foul play on the rooftop area. He also indicated that

a plastic wallet insert with photos of grandchildren and a driver's license were found in the decedent's shirt pocket but that his wallet and watch were not found. The police report indicated that the 19th, 20th and 21st floors of the building were unoccupied and locked but could be accessed via the fire escape stairwell; that the fire escape stairwell is supposed to be locked but is sometimes left open; that doors to the rooftop, which were also supposed to be locked, were found unlocked; and that vagrants could possibly get into the building for the night if they entered undetected before 6:00 p.m. when the building was locked. Sgt. P also testified that the weather on _____, was rainy and windy and that the wind was blowing so strongly on that day that he hesitated before going out on the roof to inspect it. Sgt. P also indicated that the location and condition of the decedent's body was consistent with his having either jumped or slipped off the roof.

The police report further stated that the claimant beneficiary was interviewed and advised that the decedent, then 61 years of age, had been laid off 11 years earlier by an oil company for whom he worked as a production engineer; that he had since been unable to obtain employment at the level he previously enjoyed; that the decedent's age discrimination suit against the company was dismissed a year earlier; that the weekend security guard employment was the only employment the decedent could obtain, having been told he was overqualified for other jobs; that she and the decedent were having financial difficulties; that the decedent had been depressed; and that the decedent had spoken of suicide in the past and as recently as a year earlier. The report also stated that the claimant beneficiary said that the decedent seemed fine when he left for work on _____, and that she noticed nothing out of the ordinary.

The police report stated that Mr. S, the assistant chief engineer for the building, was interviewed and stated that the decedent had mentioned having money problems, wanting as much work as he could find, and preferring to work on weekends to get away from his wife.

According to the April 31, 1998, statement given by Mr. T, the building director of security and the decedent's supervisor, to a representative of the building owner, the decedent, who had worked at the building for nearly 12 years as a weekend security guard, was an excellent employee, had made no comments about jumping off the roof or anything like that, and that his death was a total surprise to his fellow employees. However, in a statement taken by the carrier on January 25, 1999, Mr. T, then a minister at the (Church) in another state, stated that he had been shocked that a man with the decedent's employment history had sought a security guard job; that the decedent told him at the interview that he was taking the job to get away from his wife who works during the week as a nurse; that over the course of the decedent's employment he had confided in Mr. T about his severe marital unhappiness; that the decedent had alluded to financial difficulties; and that about a year before his death, the decedent, who until that time had always been impeccably groomed, began to appear unkempt and his manner, usually jovial and outgoing, became more withdrawn. Mr. T further stated that a code had to be entered to take the elevator to the 21st floor; that while the decedent's duties included going to the 21st floor elevator penthouse to monitor the temperature for the elevator computers, they

did not require that he go out on the roof; that at the edge of the roof there is a wall three and one-half to four feet high with a steel post fence arrangement on top for a total barrier protection of approximately five feet; and that, in his opinion, one would have to have climbed over the wall to fall. Mr. T also stated that the decedent, who normally worked the weekends, was working his shift on _____, while he was on vacation and that when he spoke with the decedent on February 11th, he seemed to be in an unusually good mood.

Dr. C testified that he had been the decedent's family doctor for more than 20 years; that while not a psychiatrist, 20 to 30% of his practice involves treating depression; that the decedent had consulted with him about depression after the termination of his employment for what he perceived as age discrimination; that he feels the decedent would have shared his feelings with him were he feeling suicidal; and that he had treated the decedent within six months of his death, saw no indication of suicidal ideation, and feels he would have noticed were there something wrong with the decedent. Dr. C further testified that he had reviewed both the police report and the autopsy report; that the autopsy report is consistent with death by accident or homicide; and that he saw no evidence to support the conclusion that suicide was the cause of death. Dr. C further testified that not only did he not have any reason to believe that the decedent committed suicide but that he was of the opinion that the decedent did not do so because of his devotion to his grandchildren and his strong religious convictions. He also noted that a laceration on the decedent's head was consistent with a blunt trauma injury before the fall which, he said, was a possibility.

The claimant beneficiary testified that the decedent took the job as a security guard in order to be around people; that he was a very private person and a thoughtful man and would never have said he worked in order to get away from her; that there was no drastic change in the decedent's appearance or manner in the year before his death; that he had not been down or extremely depressed and had not in the past mentioned suicide; that the decedent was a religious person and would not commit suicide, an act he would have regarded a mortal sin; and that the decedent spent the week days caring for his grandchildren with whom he had a very close relationship, another reason why he would not commit suicide. She also stated that they were not having financial difficulties and that if they were, the decedent would have sought full-time employment. The claimant beneficiary testified that the decedent always wore his watch to work and took his wallet. She also indicated that she knew from the decedent's comments over the years that sometimes street people would gain access to the building to use restrooms or be sheltered from inclement weather and that when the decedent made his rounds of the building, he would check the roof to make sure the doors were locked and no street people were up there.

The testimony and written statements of neighbors and friends noted the decedent's devotion to his grandchildren and questioned suicide as the cause of his death.

The carrier's TWCC-21 dated April 9, 1998, states as follows: "Carrier disputes compensability. The injury/death was caused by the employee's willful attempt to injure himself."

The claimant beneficiary had the burden to prove by a preponderance of the evidence that the decedent's fatal injury was sustained in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 980434, decided April 16, 1998. Section 408.181(a) provides that an insurance carrier shall pay death benefits to the legal beneficiary if the compensable injury to the employee results in death. A compensable injury is an injury which arises out of and in the course and scope of employment. Section 401.011(10). Section 406.032(1)(B) provides that an insurance carrier is not liable for compensation if the injury was caused by the employee's willful attempt to injure himself or to unlawfully injure another person.

The carrier challenges findings that the decedent's fatal injury was not caused by his willful attempt to injure himself; that his death occurred within the course and scope of his employment; that vagrants were known to gain access to the building where he worked; that the employer's missing person report was a strong inference that the employer suspected foul play; that the decedent had his wallet and watch with him at work; and that he fell or was pushed off the roof to his death.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, 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). We will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). That another fact finder may have inferred from the evidence that the decedent intentionally jumped off the building rather than either being pushed off or accidentally falling off does not provide us with a basis to reverse. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. Compare Texas Employers Insurance Association v. Gregory, 534 S.W.2d 166 (Tex. Civ. App.-Houston [14th Dist.] 1976, no writ); Texas Workers' Compensation Commission Appeal No. 950998, decided July 27, 1995; and Texas Workers' Compensation Commission Appeal No. 981925, decided September 25, 1998.

The carrier also appeals the finding that the statement on the carrier's April 9, 1998, TWCC-21 form "is too vague and non specific [sic] to place Claimant on notice of why Carrier disputed a work-related injury/death." We agree with the carrier that this finding is clearly erroneous and must be reversed as must the related conclusion of law that the carrier "did not specifically contest compensability of the claimed fatality pursuant to [Section 409.022] and Rule 124.6 and is therefore liable for this claim." Section 409.022 provides that an insurance carrier's notice of refusal to pay benefits under Section 409.021

"must specify the grounds for the refusal." Rule 124.6(a)(9) provides in part that the TWCC-21 contain "a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits." In our view, the carrier's April 9, 1998, TWCC-21 quite clearly states the exception in Section 406.032(1)(B) as the reason for the carrier's refusal to commence paying death benefits to the claimant beneficiary. It could hardly be more clear unless Section 406.032(1)(B) were quoted verbatim.

We reverse Finding of Fact No. 13, Conclusion of Law No. 6, and so much of the hearing officer's decision as states that the carrier did not specifically contest compensability of the claimed fatality pursuant to Section 409.022 and Rule 124.6. We affirm the remaining findings of fact, conclusions of law, decision, and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge