APPEAL NO. 991788

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 July 22, 1999. The appellant (carrier) and the respondent (claimant/beneficiary) stipulated that (decedent) date of death was _____, and that his widow and two children are his beneficiaries. The hearing officer made the following findings of fact and conclusion of law:

FINDINGS OF FACT

2. On _____, Decedent was working in [City 2], Texas at the direction and for the benefit of his employer on a project.

3. Decedent had been working the same project for some time, supervising and taking the crew to and from the job site.

4. Decedent was reimbursed by the employer for gas money for the use of his personal vehicle in going to and from [City 2], Texas for the project. In addition, employer paid for some parts so repairs could be made to Decedent's personal vehicle.

5. The company vehicle was also broken and in need of repair. Decedent did not think his van was repairable, but did believe that the company van could be fixed.

6. On _____ Decedent was working on the company van in order to get it back into running condition to return the crew to [City 1].

7. While obtaining an extension cord to continue working on the van, Decedent was struck by a car and suffered from fatal injuries.

8. On _____, Decedent was the employee of _____, employer at the time Decedent was struck by the vehicle.

CONCLUSION OF LAW

3. Decedent's/Claimant's death occurred in the course and scope of employment.

The carrier appealed the findings of fact and the conclusion of law set forth in this decision, urging that they are against the great weight and preponderance of the evidence and incorrectly interpret and apply the 1989 Act. It contended that at the time of his death, the deceased had ceased his employment with the employer and was not furthering the business or affairs of the employer and that the deceased's travel out of City 1 was not in the course and scope of his employment. The carrier requested that the Appeals Panel

reverse the decision of the hearing officer and render a decision that the deceased's death did not occur in the course and scope of his employment and that his beneficiaries are not entitled to benefits. The beneficiaries responded, urged that the evidence is sufficient to support the decision of the hearing officer and that the hearing officer properly applied the law to the facts, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a detailed statement of the evidence and a detailed summary of the evidence will not be included in this decision. Briefly, the deceased and four other employees of the employer, a plumbing company, lived in City 1 and worked on a job in City 2, about a four-hour drive away. The employer provided an apartment near the job site in City 2 for the use of the crew; the crew worked at the job site in City 2 Monday through Friday and returned to City 1 for weekends; the crew routinely worked longer Monday through Thursday so that they could leave at about noon on Friday to return to City 1; the employer and the deceased each had a van and each of the vans had been having mechanical problems; and, in the past, the deceased had been using either the employer's van or his van to transport the crew to and from City 1 and City 2. The deceased had advised the employer that for personal reasons _____, would be the last day that he would work for the employer. The deceased was struck by a vehicle while crossing a road between the apartment and the work site on _____. There is evidence that he was going to get an electrical cord so he could have light to work on a van. The evidence is conflicting as to which van he was working on. In an affidavit, one of the crew members stated that on _____, the deceased and another crew member were working on the employer's van and that he, the affiant, was told to keep working to finish the job so that they could return to City 1 that night. The owner of the employer testified that there was still considerable work to be done on the phase of the job that was being worked on. The carrier contended that the deceased's employment with the employer ceased at the time the normal shift ended on _____; that he was working on his personal van so that he could return to City 1; that only the deceased, and not the other crew members, were going to return to City 1 on that day; and that he was not furthering the business affairs of the employer. The beneficiaries contended that the deceased remained an employee of the employer until he returned the crew to City 1; that he was working on the employer's van; and that he received the fatal injuries in the course and scope of his employment.

The hearing officer is the trier of fact and 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.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual

determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it 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 could 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). The appealed findings of fact are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Generally, a finding of fact is a conclusion drawn from evidence without exercise of legal judgment, and a conclusion of law is a finding determined through the application of rules of law based on facts found in findings of fact. The carrier contended that the hearing officer did not properly apply definitions in the 1989 Act in making her determinations. To the extent that legal judgment was used in making Finding of Fact No. 8, there is no indication that definitions in the 1989 Act were not properly applied. The deceased had not started travel to City 1 when he was struck by the vehicle, and the hearing officer was not required to apply the provisions concerning travel to and from work in the definition of course and scope of employment in Section 401.011(12) in making her determination that the deceased's death occurred in the course and scope of his employment. There is no indication that the hearing officer did not properly apply the law in making Conclusion of Law No. 3.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge