APPEAL NO. 011700
FILED SEPTEMBER 5, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on May 10, 2001, with the record closing on June 20, 2001, the hearing officer found that on _____, the deceased employee, decedent, did not injure himself while furthering the business interest of the employer and concluded that the decedent was not in the course and scope of employment at the time of the accident which resulted in his death on _____. The appellant (claimant beneficiary) has requested our review of this determination for evidentiary sufficiency. The respondent (carrier) urges in response that the evidence is sufficient to warrant our affirmance.

DECISION

Affirmed.

According to the accident report in evidence, on the evening of _____, the decedent, a security guard, was struck and killed by a vehicle while crossing a frontage road which parallels an interstate highway where a motor vehicle accident (MVA) had just occurred. This report reflected that the decedent had parked his car near a stop sign on a street which intersected the frontage road. The claimant beneficiary testified that the decedent, her husband, was working as a security guard at a construction site, which she contended was near the scene of the MVA. Apparently, as an explanation for the decedent's leaving the property he was securing, the claimant beneficiary stated that the decedent had previously told her about several instances where he had chased trespassers or thieves off the sites he was securing, or followed them to get licence plate numbers for the police. She also said she visited the site where her husband was killed about a year later and estimated that he had parked his truck about 40 to 50 feet from the location where he was hit.

The carrier introduced a copy of the employer's Standard Operating Procedures (SOPs) for its security guards, which states that in the event of emergencies such as fires, accidents, and criminal emergencies, the officers are to get help quickly, including calling 911. They are instructed not to administer first aid (unless trained); not to intervene in criminal emergencies or attempt to catch, hold, or apprehend suspects; not to chase a suspect (except from a safe distance to observe); and not to leave their posts until properly relieved. Mr. C, the employer's operations director, testified by deposition that the decedent was an unarmed, "non-commissioned" security officer who had no more authority than the average citizen; that the SOPs are kept at each post, are the same except for any site-specific data, and that the decedent probably had the SOPs in his truck since there was no guard shack at his site; that a security guard's only responsibility is for the property being secured; and that a security guard is not supposed to leave the post and doing so is serious misconduct. He stated that the decedent violated the SOPs by leaving his post; that he was off his post when he was on the intersecting road and the service road; and

that he should have called 911 instead of leaving his post. Mr. C further testified that the decedent's truck was off the property he was securing by about 200 to 250 yards or more.

Mr. J testified by deposition that he stopped behind the MVA on the interstate highway, and saw three men get out of the car involved and run towards a wooded area; that he ran up to the service road watching where they were running; and that he then saw the decedent get out of his truck on the intersecting road and yelled to him about the three men running away. He said that the decedent started across the service road towards the scene of the MVA and was struck by a pickup truck and fatally injured.

The hearing officer found that the decedent was not furthering the business of his employer at the time of the accident and thus concluded that he was not injured in the course and scope of his employment. The hearing officer explained in his discussion of the evidence that he considered the distance of the decedent's accident from the security site as well as the evidence that the three men were running away from the MVA and that the security guards were instructed to remain on post and call 911.

The claimant beneficiary had the burden of proving by a preponderance of the evidence that the decedent was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The definition of "course and scope of employment" (Section 401.011(12)) provides that the term may include an activity conducted on the premises of the employer or at other locations. Whether an employee sustained an injury while in the course and scope of the employment must be determined on the peculiar facts of each case and as a question of fact. Texas Employers Ins. Ass'n v. Anderson, 125 S.W.2d 674, 677 (Tex. Civ. App.-Dallas 1939, writ ref'd.). The Appeals Panel has previously considered cases involving injuries arising during a violation of an employer's instructions. In Texas Workers' Compensation Commission Appeal No. 970671, decided May 29, 1997 (Unpublished), the Appeals Panel cited Maryland Casualty Co. v. Brown, 131 Tex. 404, 115 S.W.2d 394 (1938) for the proposition that "a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing the work, but that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation." *And see* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993. The hearing officer is the sole judge of the relevance, materiality, 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)). We are satisfied that the challenged determination of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**C.T. CORPORATE SYSTEMS**
**350 N. ST. PAUL STREET**
**DALLAS, TEXAS 75201.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge