APPEAL NO. 971572

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 25, 1997, a hearing was held. After closing the record on July 17, 1997, she (hearing officer) determined that the death of deceased was not compensable and that the respondent's (carrier) dispute was sufficiently raised. Appellant (claimant) asserts that deceased's use of a harness to relieve his neck pain was "reasonable" in regard to his health and comfort; she added that deceased did not know that there was workers' compensation insurance available, that deceased had cervical pain, that deceased's work made his cervical pain worse, that deceased had sought relief other than medical care for his neck pain, and that other people had recommended traction to deceased as a way to relieve his neck pain. Claimant concludes that deceased's use of a self-made traction device was reasonable and that his injury and death were compensable. Carrier replies that the decision should be affirmed, stressing that the decision is based on a factual determination.

DECISION

We affirm.

Decedent worked for (employer) on _____. The facts were generally not in dispute in this case. The deceased worked for employer for about three years. Claimant described decedent's work as that of a repair technician, stating that he made special-order golf clubs. She said that his work was repetitive and that he regularly complained of his neck at the end of the day. She also said that before working for employer, decedent worked for years for other golf companies doing similar work. Claimant introduced a 1981 claim showing that decedent had had "pain in right shoulder, back, and neck from sitting in one position. . . ."

On _____, deceased was found by a coworker during the noon hour dead, apparently from choking. Mr. M, president of the employer, said that another employee found deceased at deceased's work area "almost in a prone position hanging by the neck, by a strap that was around his head and came around and like a V right at his chin." A description of the "traction device" used is in the record and says that deceased had "rigged a harness from a tie-down strap with hooks on the ends . . . the strap was hooked over the door and had tightened around his neck. . . ."

Statements in the record indicated that a traction device had been suggested to decedent by others as a way to seek relief. Mr. B said that he helped decedent carry sound equipment to dances on weekends and that decedent complained of his shoulders and neck. When decedent mentioned hearing of a device that involved a harness under his chin to "get the weight off his shoulders," Mr. B said he told decedent to be careful, and also told him of a device offered by a drug store for that purpose. A massage therapist, who stated that decedent had received treatment from her for a period of time, also said she told decedent of a "traction device" she bought at a drug store for her own use; she

cautioned decedent about not letting his chair slip when using such a thing. Mr. M testified that he did not know of decedent's neck pain prior to his death. He said that he and decedent were in the same weekly Bible study group and there had been no requests for prayer regarding any pain in decedent's neck. There was no evidence offered that anyone at the work site knew that decedent had ever placed himself into a traction device (or was about to) at work. Mr. M also said that he did not recognize the material used in the device as coming from the work site. Mr. M said that he learned of decedent's neck pain after his death. (There was no evidence that claimant had any medical training, had any particular knowledge of traction devices, or had ever rigged any kind of traction device before, at home or at work.)

The death certificate states that the cause of death was hanging but does not check any listed manner of death, which includes, "natural, accident, suicide, and homicide." An earlier death certificate had listed "suicide." The final certificate also stated: "Additional information from associates indicated that the deceased was suffering from intractable cervical spine pain and may have suspended himself in order to provide traction on the spine to relieve the pain as recommended by friends with similar problems."

The only medical records showing any treatment for the decedent were chiropractor records from 1981.

Claimant's appeal questions the hearing officer's "interpretation" of whether decedent's actions were "reasonable" for his health and comfort. The claimant's position at the hearing was that the decedent was in the course and scope of employment when he died, that "he was seeking relief from the pain for his neck injury," and that decedent was under the personal comfort doctrine. The hearing officer in her Statement of Evidence cited Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), for the proposition that a claimant does not have to be performing a work task at the time injured if that claimant is doing something of a "personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger." The hearing officer then stated that she did not find it reasonable for the deceased to rig a "self-made traction device, using it at his place of work, and accidentally hanging himself. . . ." She therefore stated that the death was not in the course and scope of employment.

Claimant cited Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995, which affirmed an injury when a worker tried to answer a question from a coworker about work and swallowed a toothpick he kept in his mouth. A concurring opinion stated that the question was one of fact for the hearing officer to decide. A dissenting opinion was also registered. The majority cited both Director, State Employees Workers' Comp. Div. v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ) and Texas Employers' Ins. Assoc. v. Villasana, 558 S.W.2d 917 (Tex. Civ. App.-Amarillo 1977, no writ), as using the same standard as Yeldell, *supra*, that is, course and scope of employment includes personal acts "that a person might reasonably do for health and comfort." Bush, *supra*, also stated that such questions are generally ones of fact. Under the test applied, which is not appealed, although the application of that test is appealed, the

evidence is sufficient to support the hearing officer's determination that claimant's act was not reasonable for his health and comfort. In considering whether the evidence was sufficient to support the hearing officer, we note that the decision is one of factual determination for the hearing officer to make as to whether the act was reasonable; we note also that the act is dangerous and not commonly done in the workplace--in addition to the result, even claimant's evidence showed that decedent had been warned by others about such a device; we note that decedent was not shown to have any training in using such a dangerous device; and we note that there was no evidence that employer permitted any acts for health and comfort that might pose such a danger, although also possibly promoting health and comfort. *See* Texas Workers' Compensation Commission Appeal No. 951577, decided November 8, 1995, for an example of an affirmed determination that an act was reasonable for health and comfort. In that case, a claimant thought a heart attack was occurring and was injured when he attempted to call for medical care.

While not directly argued at the hearing, a question of whether decedent deviated from his work may be closely associated with a personal comfort question and may arise out of a general assertion that decedent was in the course and scope of employment. The case of Southern Surety Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.-Eastland 1931, writ refused), affirmed a decision for the family of decedent in that case. The decedent therein was killed when he joined others to hunt nearby the pump at an oil well site that decedent was hired to oversee 24 hours a day. In affirming, the court noted that decedent could still hear whether the pump was working correctly or not from his position when killed; the court commented that decedent would be on duty when eating and looked to "ordinary human habits and requirements"; it also said that injury occurred when that decedent was "engaged in necessary diversion known and permitted by the employer." The diversion in Ranger Insurance Company v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ) was not found to be necessary or permitted by the employer when the appellate court reversed a determination for the decedent. The court stated that when decedent and others were at a farm site to retrieve butane tanks, there was no reason for decedent to have raised a piece of irrigation pipe which contacted an electrical line. The argument that the act was a small deviation while decedent was relaxing, comparable to a coffee break, was dismissed even though decedent was at that time waiting between tasks to perform. The court commented that decedent's act was "foreign to anything that had to do with the employment."

While the holding in Shook, *supra*, appears to be more liberal than Valerio, Shook was considered to be doing his work when killed and was doing it in a manner permitted by his employer. Neither factor was present in the case under review. This line of cases does not compel the hearing officer to have reached another decision and therefore does not serve as a basis for the Appeals Panel to reverse the decision concerning whether death occurred in the course and scope of employment.

Claimant does not take issue with the sufficiency of carrier's dispute of compensability so that question will not be discussed on appeal. In so saying, we do not imply that had it been appealed, the dispute filed by carrier would have been found

insufficient.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge