

APPEAL NO. 000436

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 16, 1999. The issues at the CCH were: (1) whether the deceased suffered a compensable injury, resulting in his death on _____; (2) whether the claimed injury occurred while the deceased was in the state of intoxication, thereby relieving the respondent (carrier) of liability for compensation; (3) whether the carrier's second Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) filed with the Texas Workers' Compensation Commission (Commission) on October 14, 1997, disputing compensability on the basis of intoxication was based on evidence which could not reasonably be discovered at an earlier date, or whether the carrier's defense on compensability is limited to the defense listed on the first TWCC-21 filed with the Commission on August 11, 1997; (4) what is the average weekly wage (AWW); (5) who are the proper legal beneficiaries of the deceased, and what is the entitlement period for each beneficiary; (6) what is the rate for the weekly death benefits; and (7) whether appellant (claimant beneficiary), spouse of deceased, is entitled to reimbursement for burial benefits from the carrier. The hearing officer determined that the deceased did not suffer a compensable injury resulting in his death on _____; that the AWW is \$472.35; that the proper legal beneficiaries of the deceased are claimant beneficiary, VA, minor child, and FM, minor child; and that claimant beneficiary is not entitled to reimbursement for burial benefits from the carrier because the death of the deceased was not caused by a compensable injury. Issues 2, 3 and 6 were resolved by stipulation. The claimant beneficiary appeals, urging that the preponderance of the evidence is more than sufficient to establish that the deceased's death occurred while he was performing his assigned work and was caused by drowning. The claimant beneficiary asserts that even if the claimant beneficiary failed to meet her burden to prove that the deceased's death resulted from a compensable injury, there is a presumption that the deceased's death arose out of the course and scope of employment. The carrier replies that the evidence supports the hearing officer's findings of fact and conclusions of law, and that the decision and order should be affirmed. The hearing officer's determinations on the issues of AWW, proper beneficiaries of the deceased, and reimbursement for burial benefits have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The claimant beneficiary has attached to her appeal a Notice of Fatal Injury or Occupational Disease/Claim for Compensation for Death Benefits (TWCC-42) not offered or admitted into evidence at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the document that the claimant beneficiary has attached to her appeal, but not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

The deceased worked for the employer in (City 1), Texas, inspecting and cleaning manure separating equipment at various sites on a pig farm. The deceased traveled to the sites in a pick-up truck containing cleaning equipment. On _____, deceased was seen at the beginning of the workday by his coworkers, who noticed nothing unusual. Around 10:00 a.m., the deceased was last seen alive by two coworkers, driving his assigned truck in the direction of his normal work area. Around 2:00 p.m., two coworkers discovered the deceased unconscious on the floor of a separator building. Emergency Medical Services (EMS) was called and other coworkers responded. The deceased's coworkers performed cardiopulmonary resuscitation (CPR) until EMS arrived, approximately 45 minutes later. The deceased was transported to the hospital by EMS and was pronounced dead at the emergency room at 3:00 p.m. The hospital records indicate the cause of death was cardiac/respiratory arrest of unknown etiology.

The coworkers who found the deceased in the separator building state that he was found laying on his back, face up, on the floor level below the grading; that the front of his clothes were not wet; that the floor contained one to three inches of brown liquid (effluent), the normal amount of spillage from the separator tanks; and that he exhibited no signs of life. The deceased was moved to the grading level so that CPR could be performed. The coworkers who performed CPR state that the front of the deceased's clothes were dry; that a "phlegm like" substance came out of the claimant's nose and mouth when CPR was being performed; that they felt "cracking" of the claimant's ribs when they performed CPR; and that one coworker hit the deceased with his fist several times in an effort to resuscitate him. After the deceased was taken by ambulance, the safety manager for the employer tested the air in the separator building for hydrogen sulphide, ammonia, and methane gases, and found all levels below OSHA permissible exposure standards. The safety manager also had a certified electrician inspect the wiring and he found no electrical problems.

City 2 County Medical Examiner's Office performed an autopsy on (day after date of injury), at 10:00 a.m. at the request of the Justice of the Peace. Dr. H determined the cause of death to be "compatible with drowning." The only background information provided to Dr. H at the time of the autopsy was the information provided by the Justice of the Peace. Dr. H comments that there was a moderately large accumulation of hemorrhage into the abdominal cavity suggestive of trauma to the abdomen, trauma to the chest wall with multiple rib fractures and a sternal fracture, and that such injuries may be "associated with vigorous resuscitative efforts, or they may reflect genuine antemortem trauma." Dr. H concludes that "[t]he ultimate cause of death, however, is ascribed to drowning with the deceased being found immersed [sic] in a saline pool at the feed lot." Although it is undisputed that the deceased was not found submerged in a saline pool, Dr. H was provided inaccurate information that the deceased was found in a brine pool and that his body was probably found face down. After being provided with additional information surrounding the death, Dr. H retracted his conclusion. Dr. H now states that the cause of death cannot be established, and remains an "enigma."

The carrier presented the testimony of two forensic pathologists who reviewed the autopsy results and information surrounding the circumstances of death. Dr. V testified that Dr. H's conclusion that the cause of death was drowning was based on incorrect information, and that the cause of death cannot be determined. Dr. V attributed the deceased's broken ribs and sternum to CPR and stated that such injuries did not cause death. Dr. G testified that the death resulted from undetermined, natural causes, most likely a seizure; that an undetermined cause of death is frequently the result of a seizure disorder or cardiac arrhythmia which cannot be detected through autopsy; that the death was not caused by drowning because there was no evidence that the deceased was immersed in water and there was no evidence of a saline pool; that blood in the abdominal cavity could be related to resuscitation or seizure; that fluid in the lungs can occur with a seizure or cardiac arrhythmia; and that broken ribs and a broken sternum can occur with CPR. Dr. G testified that additional tests would have been instructive.

The claimant beneficiary asserts that the death was a result of a fall which incapacitated the deceased to such an extent that he fell in a pool and drowned. The claimant beneficiary argues that a frontal fall from the upper platform onto the pipe below could have caused the severe fractures; that the deceased's face was in contact with the effluent material in the pool; that Dr. H's original conclusion that the cause of death by drowning is corroborated by the hospital nurse's records and the deceased's expulsion of fluids during CPR; and that ingestion of effluent caused rapid decomposition of the deceased's body.

Section 408.181 provides that an insurance carrier shall pay death benefits to the legal beneficiary if a compensable injury to the employee results in death. A compensable injury is an injury that arises out of and in the course and scope of employment for which compensation is payable. Section 401.011(10). Section 401.011(12) defines "course and scope of employment" to mean an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. In Deatherage v. International Insurance Company, 615 S.W. 2d 181, 182 (Tex. 1981), the Texas Supreme Court stated that "as a general rule, a claimant must meet two requirements: (1) the injury must have occurred while the employee was engaged in or about the furtherance of the employer's affairs or business; and (2) the claimant must show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business or profession." We have stated that where, as here, the matter of causation is outside common experience expert testimony is required to establish that the death is causally connected to the employment. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492, 495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93939, decided November 24, 1993.

The hearing officer determined that the deceased did not suffer a compensable injury resulting in his death on _____ . In so determining, the hearing officer

found that the deceased's death occurred while he was performing his assigned work activities but his death was not caused by the work activities and it did not arise out of his work activities. The claimant beneficiary had the burden to establish that the deceased's death is compensable under Section 408.181. There was no evidence presented to indicate that the claimant sustained a fall or suffered a traumatic event and the medical evidence does not establish a cause of death. Three forensic pathologists conclude that the deceased did not drown and that the cause of death is undetermined.

The claimant beneficiary asserts that even if she failed to meet her burden to prove that the deceased's death resulted from a compensable injury, there is a presumption that the deceased's death arose out of the course and scope of employment as stated in Deatherage, *supra*. In Deatherage, the employee was a night watchman who lived in a trailer on the employer's premises. A fire of unknown origin and time killed the employee in the trailer. The employee could not show the cause or origin of the fire. The Texas Supreme Court remanded the case for further proceedings, held that the issue of compensability was a question for the jury to determine, and stated:

When an employee is found dead at a place where his duties require him to be, or where he might properly have been in the performance of his duties, during the hours of his work, it has been said that in the absence of evidence that he was not engaged in his master's business, there is a presumption that the accident arose out of and in the course and scope of employment within the meaning of the compensation statute. [Emphasis added.]

After remand, the Austin Court of Appeals, in Deathrage, reversed a judgment in favor of the claimant beneficiary and stated:

Even had appellee proved the fire occurred during working hours, there was insufficient evidence to connect the risk of the fire, or its cause, with Deatherage's duties. Under the state of this record, Deatherage simply died "at home," in his trailer house. In conclusion, there was an insufficient showing that the fire was a risk reasonably incidental to the work required of Deatherage.

The presumption was not applied in the Deatherage case and the Appeals Panel has not applied such a presumption to relieve a claimant beneficiary of its burden to prove that an employee's death resulted from a compensable injury. See Texas Workers' Compensation Commission Appeal No. 91015, decided September 18, 1991 (not involving a death); Texas Workers' Compensation Commission Appeal No. 91044, decided November 14, 1991 (involving a heart attack). In Appeal No. 91044, the Appeals Panel reviewed cases which discussed, although did not apply a presumption, and stated that the cases involved workers clearly injured from a specific incident such as an assault, car wreck or fire, and dealt with issues of whether the worker was serving the employer's

interest at the time of death. In this case, it is undisputed that the claimant was performing his assigned work activities at the time of his death. Considering the cases cited above, we do not apply a presumption to relieve the claimant beneficiary of her burden to prove that the deceased's death resulted from a compensable injury.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that the deceased did not suffer a compensable injury resulting in his death on _____.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge