APPEAL NO. 002026

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 August 9, 2000. With regard to the four issues before him, the hearing officer determined that: decedent sustained a compensable injury (was in the course and scope of his employment) on _____, which resulted in his death; (2) the appellant (carrier) did not waive the right to contest compensability of the decedent's injury/death; (3) the appellants (claimant beneficiaries) were legal beneficiaries of the decedent; and (4) the respondent, subclaimant. (employer), was entitled to burial benefits from the carrier in the amount of $2,500.00. The determinations regarding the carrier's timely contest of compensability and the claimant beneficiaries as legal beneficiaries have not been appealed and the hearing officer's decision on those issues has become final pursuant to Section 410.169.

The carrier appeals the hearing officer's ruling that the employer is a subclaimant, that the decedent was in the course and scope of his employment at the time of his death, and that it is liable to the employer for burial expenses in the amount of $2,500.00. In an unusual turn of events, the claimant beneficiaries also appeal, arguing that the decedent was not in the course and scope of his employment at the time of his death, appealing certain specific findings and arguing this is not a "personal comfort doctrine" case. The claimant beneficiaries question the employer's motivation in arguing that the decedent was in the course and scope of his employment. Both the carrier and the claimant beneficiaries request that we reverse the hearing officer's decision and render a decision that the employer has no standing in this case and that the decedent was not in the course and scope of his employment. The employer responds, pointing to evidence that it did have standing to participate in the proceeding and that the decedent died in the course and scope of his employment. The employer urges affirmance.

DECISION

Affirmed.

As noted, this is a somewhat unusual case where the claimant beneficiaries argue that the decedent was not in the course and scope of his employment in order to prosecute a two million dollar civil lawsuit against the employer, with the carrier agreeing with the claimant beneficiaries in order to preclude the payment of workers' compensation benefits. The basic background facts are not seriously in dispute.

The decedent was a "groundhand" and loader operator at the employer's asphalt plant, which manufactured asphalt "hot mix." A by-product of the manufacturing process was "a dirty steam," which comes off the "scrubber" and coats the surrounding area, including, apparently, the parking lot, with a light film. The decedent had been directed to come to work on _____, to fix a broken bearing on a piece of equipment and to "push rock," or "move a stockpile." The decedent clocked in at 8:20 a.m. on _____, fixed the bearing and moved the crushed rock until the brakes on the loader froze and he had to stop. The decedent then started to wash his personal vehicle while on the premises, using

the employer's steam power sprayer. While using the power sprayer, the decedent was electrocuted, apparently due to a frayed electrical cord, and died. It is undisputed that the decedent did not use his personal vehicle in the employer's business and that the decedent, at the time of his death, had not "clocked out" and was still being paid his hourly wage. It is also undisputed that the employer was aware and approved of employees washing their personal vehicles with the power sprayer in order to wash off the dirty steam film. The employer's vice president and chief financial officer, Mr. C, testified that allowing employees to wash their personal vehicles with the power sprayer was "one of the perks, one of the benefits that we had for our employees." The plant manager testified that washing one's personal vehicle to get the film off "was part of his normal duty there" and that washing the vehicles was a benefit the employer provided to its employees. The plant manager also testified that the decedent could have been redirected to other duties by a supervisor at the time of his death.

The carrier was notified of the decedent's death on _____, and denied liability on March 30, 1999. Mr. C testified that the employer paid for the decedent's funeral and burial expenses in the amount of $6,701.00. In evidence is a "funeral purchase agreement" detailing the expenses and showing "paid in full." Mr. C testified that he personally had signed the check on March 29, 1999. As some point, the claimant beneficiaries filed a civil wrongful death suit and, apparently, sometime in February 2000, there was prelitigation mediation in that lawsuit. At some point, it is not clear when, the employer requested reimbursement from the carrier for funeral expenses. At the CCH, the carrier initially represented that the employer had been reimbursed $2,500.00, the maximum due under the 1989 Act, and that because no additional monies were due, the employer had no standing in the workers' compensation case. Mr. C denied that the carrier had ever paid anything and the carrier, in its appeal, conceded that "Carrier had not, as of the CCH, paid any reimbursement monies to the Employer." On March 10, 2000, the employer requested a benefit review conference (BRC) in its status as a subclaimant. The BRC report lists the employer's positions on the issues but does not list the employer as a subclaimant. At the CCH, the employer asserted that it was a party to the case as a subclaimant because its claim for reimbursement for funeral expenses had not been paid. The hearing officer ruled that the employer was a "subclaimant, is not a party to this case, but is merely a participant." The employer was allowed to call witnesses, present exhibits, examine and cross-examine witnesses and present opening and closing arguments.

First, addressing the employer's standing, Section 409.009 states:

> SUBCLAIMS. A person may file a written claim with the commission [Texas Workers' Compensation Commission] as a subclaimant if the person has:
>
> (1) provided compensation, including health care provided by a health care insurer, directly or indirectly, to or for an employee or legal beneficiary; and

(2) sought and been refused reimbursement from the insurance carrier.

The employer contends, and Mr. C testified, that the employer had paid funeral and burial expenses on March 29, 1999, and had made a claim for reimbursement from the carrier. Also in evidence is the Notice of Fatal Injury or Occupational Disease/Claim for Compensation for Death Benefits (TWCC-42) dated March 15, 2000, showing payment of a $6,701.90 funeral bill. The carrier contends, in its appeal, that the employer "has never provided a canceled check, payment record, or any other document to the Carrier to support its demand for reimbursement." Mr. C testified that a written demand had been made and provided a copy of the funeral purchase agreement marked "Paid in Full," and the TWCC-42. While other documents, such as a demand letter, might have been more convincing, the hearing officer could, and apparently did, accept this testimony and evidence. While the testimony and evidence is unclear whether the carrier ever actually denied the reimbursement, Mr. C's testimony, as the employer's chief financial officer, is clear that no reimbursement has been made. The carrier argues that under Section 409.011(b)(4) (the employer's bill of rights) the employer could only contest compensability if the carrier has accepted liability, which in this case the carrier has refused to do. We disagree with the carrier because the only way the employer can recover its funeral/burial costs is by proving compensability of the claim. To tell an entity that it may be a subclaimant to obtain reimbursement from the carrier but then not allow that entity to present evidence as a party to show compensability would be a hollow right, indeed. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 140.1 (Rule 140.1) defines "Party to a Proceeding" as "[a] person entitled to take part in a proceeding because of a direct legal interest in the outcome." We believe it is undisputed that the employer has a direct legal interest in the outcome of this case. Rule 141.1(a) provides that a BRC may be requested "by a claimant, a sub-claimant, a carrier, or an employer who has contested compensability." Further, we note that we have allowed health care providers to be subclaimant parties in a number of cases. In Texas Workers' Compensation Commission Appeal No. 980395, decided April 6, 1998 (Unpublished), we allowed a subclaimant chiropractor to appeal a decision on extent of injury in the doctor's own right. In Texas Workers' Compensation Commission Appeal No. 962422, decided January 6, 1997 (Unpublished), we allowed a hospital subclaimant to appeal the compensability of a heart attack where the subclaimant was "not specifically named as a 'party' in the style of the CCH decision." In the instant case, we affirm the hearing officer's ruling that the employer is a subclaimant and expand that ruling to include that the employer is a party to the proceeding as having a legal interest in the outcome.

On the issue of course and scope, the carrier takes issue with some of the hearing officer's comments that use of the power sprayer was "a way to keep employees happy despite the almost daily raining down of effluent from the scrubber of the asphalt plant onto their vehicles. . . ." We agree that may be somewhat of an overstatement, but there was substantial evidence that the scrubber caused a dirty steam film on cars and other items, and that the employer allowed employees to wash their vehicles with the power sprayer as a benefit of the employment. It is also undisputed that while the decedent had finished his

assigned tasks on the day in question, he was also still "on the clock," that he was being paid for the time he was washing his vehicle and that the employer was aware of, and approved of, that procedure. The hearing officer and the parties classify this case as a personal comfort case. We agree with the claimant beneficiaries to the extent that this is not a personal comfort case. As the parties recite, course and scope is defined in Section 401.011(12) as being an activity that has to do with and originates in the employer's work, trade or business, and is performed while engaged in or about the furtherance of the affairs or business of the employer. We find the "Bunkhouse" cases and some of the cases cited by the parties inapplicable. Texas Workers' Compensation Commission Appeal No. 960846, decided June 14, 1996, cited by the claimant beneficiaries, is a death case which is applicable to this case. In Appeal No. 960846 the deceased worker asked a coworker for help in jump starting his car, which was in the employer's parking lot, during an afternoon break. While jump starting the car, the deceased employee fell backward, hit his head and died. The hearing officer found the claim compensable and the Appeals Panel reversed and rendered a new decision. In that case, we discussed a number of personal comfort cases, including cases going to the restroom, relaxing, etc., and went on to comment:

> On the other hand, when an employee uses his break to attend to personal business, chores or errands, even with the express or implied permission of the employer, those cases are more likely to constitute a deviation from the employment. *See* [Ranger Insurance Co. v. Valerio, 533 S.W.2d 682 (Tex. App.-El Paso 1977, no writ)], chasing a rabbit, [Roberts v. Texas Employers' Insurance Ass'n, 461, 429 (Tex. Civ. App.-Waco 1971, writ ref'd)], loading a box in the employee's vehicle, and [Texas Workers' Compensation Commission Appeal No.] 94089, [decided February 14, 1994], loading scrap plywood in the employee's pickup for personal use.

In a more recent case, Texas Workers' Compensation Commission Appeal No. 001700, decided September 8, 2000, a case where the employee injured her knee going to check her car, we affirmed a finding of compensability, stating:

> We therefore hold that an act which is reasonably anticipated to be performed by an employee, performed while on the premises, and which does not deviate from the course and scope of employment to the extent that an intent to abandon employment can be inferred, remains within the course and scope of employment. . . . We do not hold that every act which an employee may engage in on the employer's premises, even if engaged in during an approved break, will remain within the course and scope of employment.

In the instant case, the reason the decedent was washing his vehicle with the employer's power washer was that the vehicle, either that day or on a previous day, had been soiled due to the employer's process of creating the dirty steam film. The testimony from both the plant manager and Mr. C was that the power washer was purchased, at least in part,

to accommodate employees washing the steam film generated by the employer's process off their personal vehicles. The plant manager had testified that cleaning the vehicles "was part of his normal duty there." If there was a deviation from the course and scope of employment, it was not to the extent that there was an intent to abandon the employment and it could well be argued, citing the plant manager's testimony, that there was no deviation at all, and the decedent was in the course and scope of his employment doing what his employer expected him to do.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge