

## APPEAL NO. 990677

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 February 23, 1999. He (hearing officer) determined that the deceased sustained a compensable fatal injury in the form of a heart attack on \_\_\_\_\_; that the proper eligible beneficiaries of the deceased were the respondent/cross-appellant (spouse), a daughter born of this marriage, and a daughter not born of this marriage; and that a son born of this marriage was not a proper beneficiary because he was 18 years old and not enrolled as a full-time student in an accredited educational institution. The appellant/cross-respondent (carrier) appeals the determination that the deceased sustained a compensable heart attack, contending that this determination was not supported by the evidence. The spouse replies that this decision is correct, supported by sufficient evidence, and should be affirmed. The spouse appeals the determination that the son was not a beneficiary, contending that the hearing officer failed to adequately develop the evidence on this point. The carrier replies to this appeal with the simple comment that the decision and order should reflect the "truth" concerning the son's status. No suggestion of what that "truth" might be was offered by the carrier.

### DECISION

Reversed and rendered as to both issues.

On \_\_\_\_\_, the deceased, who was 37 years old at the time, was working as a welder on the roof of a tank at City 1, Texas, near City 2. The roof was inside the walls of the tank and would be raised when completed. Work began at 7:00 a.m. Mr. M, a coworker, testified that \_\_\_\_\_, was "a normal hot summer day." He said the deceased looked the same that morning as any other and that he took water breaks as needed. Mr. M further testified that at 11:40 a.m. the deceased descended the ladder to use the restroom.<sup>1</sup> He said the deceased returned at 11:50 a.m. and realized he forgot his safety glasses. He returned back down the tank to get them and did not return before the noon lunch break. Lunch was in a shaded area. When Mr. M arrived at the lunch area, he said he saw the deceased already sitting there. At this point, he said, everyone was sweating. Mr. M then asked the deceased if he was "alright" and the claimant responded, "Yes," but that he felt "overheated." The deceased, within three or four minutes, got up, took some steps and collapsed. An ambulance was called and the deceased was taken to the hospital emergency room (ER) where he arrived at 12:46 p.m. He was pronounced dead at 1:09 p.m. The ER diagnosis was cardiopulmonary arrest.

Various statements were admitted into evidence from coworkers which included comments about the heat and humidity at the work site along with official weather records from nearby sites. This evidence supports the conclusion that the humidity was high and

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<sup>1</sup>Mr. M was quite certain of these times because, he said, he looked at his watch at each sequence in these events.

that, at around noon on \_\_\_\_\_, the ambient temperature was mid to high 90 degrees or around 100 degrees. Speculation about the actual temperature on the roof of the tank was also offered. The spouse testified that the deceased never told her that he had heart problems, that he had worked outdoors in South Texas all his life, and that he had no previous "overheating problems."

Section 408.008 provides that a heart attack is a compensable injury only if it can be identified as occurring at a definite time and place, caused by a specific event occurring in the course and scope of employment, and if the "preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack." Section 408.008(2). The determination of the compensability of a heart attack must be based on a comparing or weighing of the effect of the work against the natural progression of a preexisting heart condition. Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. The claimant has the burden of proving the compensability of a heart attack. Texas Workers' Compensation Commission Appeal No. 91081, decided December 31, 1991. Proof of the specific event is normally established by lay testimony. Lay testimony, however, cannot establish that the work being done at the time of the heart attack was a substantial contributing factor when weighed or balanced against the natural progression of a preexisting heart condition. We have also observed that there can be more than one substantial contributing factor, but, to be compensable, the work must be a greater factor than the natural progress of any underlying heart condition or disease. Texas Workers' Compensation Commission Appeal No. 93582, decided August 23, 1993.

The hearing officer made the following findings of fact and conclusion of law which have been appealed by the carrier:

#### **FINDINGS OF FACT**

4. Due to the excessive high temperature and relative humidity at the work site, the Deceased suffered heat exhaustion between 11:40 a.m. and 12:05 p.m. on \_\_\_\_\_. One of the effects of the heat exhaustion was to trigger a pre-existing coronary thrombosis to come loose from the arterial wall to occlude the Deceased's coronary artery.
5. The Deceased's death on \_\_\_\_\_ was caused by two major factors, his pre-existing heart disease and his heat exhaustion. The heat exhaustion, which the Claimant sustained in the course and scope of his employment, was more of a substantial contributing factor to death than the natural development and progression of a thrombosis in the coronary artery.
6. On \_\_\_\_\_ the death of the Deceased arose out of and was in the course and scope of his employment with the Employer.

## CONCLUSION OF LAW

2. The Deceased sustained a compensable fatal injury in the form of a heart attack on \_\_\_\_\_.

The hearing officer commented in his Statement of the Evidence as follows:

The two main contributing factors to the Deceased's fatal heart attack were the pre-existing thrombosis in the coronary artery supplying oxygenated blood to the heart and the heat exhaustion that precipitated the fatal events of the day and raised the Deceased's temperature to 101 degrees. The coroner, the hospital ER, and EMS provided the preponderance of the **medical evidence** in this matter, not the peer review doctor. The preponderance of this evidence included the heat exhaustion, sustained while working, as a major contributing factor. (Emphasis in original.)

He does not otherwise identify what in these records led him to these conclusions.

The ER records in evidence reflect that the deceased's temperature was 101 degrees at 12:46 p.m. and that the deceased showed acrocyanosis. The EMS report noted that when the team arrived on the scene, the deceased "was vomiting and turning purple." No diagnosis of "heat exhaustion" is made in either of these records, nor do they contain any suggestion that heat exhaustion played a causative role in the diagnosis or death. An autopsy was performed by Dr. B on September 15, 1998. The following comments were made regarding the heart:

The heart was moderately enlarged weighing 475 grams . . . . The coronary arteries were normal in distribution and with moderate segmental atherosclerotic changes [sic] except at the proximal portion of the anterior descending artery where there was a ruptured plaque with superimposed acute thrombosis . . . . There was neither infarction nor scarring . . . .

The diagnoses were: (1) acute coronary thrombosis-anterior descending; (2) cardiomegaly, left ventricular hypertrophy and "dilatation"; and (3) congestion of viscera. Dr. B concluded that it was his opinion "based upon the autopsy findings, that the [deceased] came his to death [sic] as a result of acute coronary thrombosis (heart attack). Heat exhaustion was a contributing factor." On November 7, 1998, Dr. B responded by letter to a letter from the claimant's attorney essentially as follows:

I believe that one of the contributing factors that caused [deceased's] heart attack was heat exhaustion. This is based on the information that . . . when [deceased] was taken to the hospital his body temperature was 101E F, and that he had been working on a day when the temperature was around 105E and the humidity was high.

There are no specific pathological findings at the autopsy that indicates [sic] heat exhaustion. This diagnosis has to be based on the investigation of the circumstances surrounding the death of an individual.

The death certificate reflects the immediate cause of death to be "heart attack, heat exhaustion was a contributing factor . . . ."

Dr. S, a thoracic and cardiovascular surgeon, testified at the CCH as the carrier's expert. Dr. S said that he reviewed the medical records and autopsy report and concluded that these clearly showed significant cardiovascular disease, that is, the deposit of plaque on the artery wall built up over time. It was his opinion that this plaque eroded away causing a thrombosis, or what he believed was a complete occlusion of the artery. He believed a heart attack was inevitable at some time and that the deceased's work and the heat did not cause either the plaque to accumulate or to dislodge itself from the artery wall. Rather, he concluded that the plaque erosion itself occurs over a period of months. In his opinion, the deceased's heart attack was not related to his work activities.

In its appeal of the compensability finding, the carrier argues that the hearing officer failed to properly apply the law to the facts of this case; in particular, it asserts that there was no medical evidence to support the finding that heat exhaustion caused the "pre-existing coronary thrombosis to come loose from the arterial wall to occlude the Deceased's coronary artery." The carrier also argues that there was no medical evidence even to support a finding that the deceased suffered from heat exhaustion in the time leading up to the heart attack. We believe there was sufficient evidence to support a finding that the deceased suffered from heat exhaustion. There remains the critical question of whether the medical evidence establishes that the heat exhaustion caused by work activities was a greater factor in causing the heart attack than the natural progression of the underlying cardiovascular disease.

In Texas Workers' Compensation Commission Appeal No. 950363, decided April 24, 1995, we reversed the determination of the hearing officer that the deceased's heart attack was compensable and rendered a decision that it was not. The heart attack occurred after a day's work in an attic where "the temperature was very hot with high humidity" and, at best, poor ventilation. An autopsy showed arteriosclerotic cardiovascular disease. A paramedic provided an opinion that the heat and humidity was a contributing factor in precipitating the heart attack. A retired family doctor commented that he was asked by the deceased's wife if the heat and humidity "could have been a factor" in the fatal heart attack and he answered, "Yes." The hearing officer relied on this evidence to support a finding of a compensable heart attack and found unpersuasive the autopsy report of preexisting heart disease. In reversing and rendering against this determination, the Appeals Panel noted that the evidence of the paramedic and the family doctor was insufficient to establish that the heat was a substantial contributing factor to the heart attack. Similarly, in the case we now consider, there was evidence that the deceased was working in heat and high humidity. And, as in Appeal No. 950363, *supra*, we do not believe that anything in the ER or EMS reports constituted medical evidence required to establish that the heat at the

workplace rather than the natural progression of the underlying heart condition was the more substantial factor in causing the heart attack. Dr. B's statements in both the autopsy report and his November 7, 1998, letter refer only to heat exhaustion as a contributing factor, and he conceded that no specific findings were made to indicate this condition existed. Given the seriousness of the underlying heart disease as reflected in the autopsy report, we cannot agree with the hearing officer that Dr. B's statements that heat exhaustion was "a" factor in the heart attack constituted sufficient evidence on which to base a finding that the heat exhaustion was a more substantial factor than the natural progression of the underlying heart disease. 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 find that the decision of the hearing officer that the deceased suffered a compensable heart attack is contrary to the great weight and preponderance of the evidence. For this reason, we reverse that determination and render a decision that the deceased did not sustain a compensable heart attack on \_\_\_\_\_, and that death benefits are not owed in this case.

The spouse's attorney appealed the determination of the hearing officer that the deceased's son was not an eligible beneficiary because, being 18 years of age, "[he] was not enrolled as a full time student in an accredited educational institution." Finding of Fact 8. See Section 408.182(f). In the appeal, the attorney argues that the attorney "inadvertently failed to present any evidence of the student status . . . or his dependency upon his father." He then posits error on the part of the hearing officer for failing to fully develop the record and protect the rights of the parties by making up for this "inadvertence." See Section 410.163(b). We categorically reject the argument that a hearing officer is charged with the responsibility to develop a party's case to overcome the "inadvertence" of counsel. We nonetheless must conclude that the attorney was overly harsh on himself. Contrary to his assertion on appeal, we believe that he did introduce evidence of the son's status as a beneficiary. This is contained in Claimant's Exhibit No. 1, a Notice of Fatal Injury or Occupational Disease/Claim for Compensation for Death Benefits (TWCC-42), in which the son is listed as both a child of the deceased and as a full-time student. The carrier did not object to the introduction of this document. We believe this document constituted un rebutted evidence of the son's full-time student status. Given the nature of the carrier's response to this appeal and the lack of any evidence to the contrary being introduced by any other interested party, we also conclude that the only reasonable inference to be made from this evidence is that the son was a full time student at an accredited educational institution. For these reasons, we reverse Finding of Fact No. 8 and render a decision that the son was enrolled as a full-time student in an accredited educational institution. Were death benefits owed, the son would be eligible for his statutory share of these benefits.

The decision and order of the hearing officer is reversed and a new decision rendered that the deceased did not sustain a compensable heart attack on \_\_\_\_\_, and no death benefits are owed.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Judy L. Stephens  
Appeals Judge

CONCURRING IN PART AND DISSENTING IN PART:

I dissent in part. I do not believe that was insufficient evidence supporting the hearing officer's determination that the work was a more significant factor in the deceased's heart attack than his preexisting heart disease. See Texas Workers' Compensation Commission Appeal No. 94892, decided August 18, 1994. No doctor stated this in so many words. Yet, looking at the emphasis placed on the role of heat exhaustion in the medical evidence, the hearing officer could have reasonably inferred this from the evidence, particularly in light of the fact that the objective medical evidence did not show that the claimant's heart disease was particularly severe. We have held that a hearing officer may draw reasonable inferences from the medical evidence. See Texas Workers' Compensation Commission Appeal No. 982432, decided November 23, 1998.

In any case weighing the effect of the work against the preexisting heart disease is a factual determination and I would defer to the hearing officer as the fact finder. I would find the decision of the hearing officer regarding compensability sufficiently supported by the evidence, including reasonable inferences that could be drawn therefrom. I would affirm the decision and order of the hearing officer that the claimant had a compensable heart attack. I concur with the majority decision regarding the identity of the beneficiaries for the reasons laid out by the majority.

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Gary L. Kilgore  
Appeals Judge