

APPEAL NO. 990998

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 April 7, 1999. The issues concerned whether death benefits were payable due to the death of the deceased, as a result of his compensable injury of _____. The theory of recovery was that the deceased, who died on December 9, 1996, had never fully recovered from the effects of his injury and died as the result of an infection that was the natural result of these injuries. Also in issue was whether the two minor Saul grandchildren, who are appellants (minor claimants), are eligible beneficiaries, as dependent grandchildren, of the deceased. It was stipulated that if death benefits were due, then appellant (claimant spouse) would have been the surviving widow of the deceased and a beneficiary until she was remarried.

The hearing officer, finding insufficient evidence to link the December 1996 death from infection to the injuries sustained in _____, held that no death benefits were due. He further found that the minor claimants would not have been found to be eligible beneficiaries had death benefits been awarded. He noted that the surviving daughter of the deceased would have been an eligible beneficiary, if benefits had been awarded, but that she failed to make a timely claim for death benefits.

The claimant spouse and minor claimants have appealed. They argue that apparently the hearing officer was "frustrated" by the lack of medical evidence concerning the nature and extent of the deceased's _____, injuries and in effect argue that the claimant spouse was attempting to develop this information when the hearing officer instructed the claimant spouse and minor claimants' attorney not to ask such questions. The claimant spouse and minor claimants argue that the case should be remanded to allow for development of evidence concerning the deceased's compensable injury "if the Appeals Panel agrees with the hearing officer that important medical information regarding the deceased's injuries are (sic) missing." The claimant spouse and minor claimants assert that the fact that the deceased had "recurrent" urinary tract infections was overlooked and undisputed in the record. The claimant spouse and minor claimants further assert that the mother of the minor claimants was not dependent upon the deceased and therefore would not have been an eligible beneficiary, which would mean that her children were. The respondent (carrier) responds that for the deceased's death to be compensable, it must "naturally result" from the compensable injury, and it is not enough to merely show that the death was "related to" the compensable injuries. The carrier responds that the causal connection between the death and the original injuries in this case was not one to be proved through lay testimony, but through medical evidence. The carrier further argues that the evidence produced in favor of compensability of the death would not pass muster under the Texas Supreme Court decision of Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997). The carrier points to the lack of evidence (as noted by the hearing officer) that the deceased even had the urinary tract infection to which one doctor attributed his death. The carrier further points out that one cannot be an eligible grandchild, according to the applicable rules of the Texas Workers' Compensation Commission if one's

parent is an eligible child of the deceased worker at the time of his or her death. The carrier argues that neither dependency nor the fact that the minor claimant's parent was not eligible were proven by the claimant spouse and minor claimants.

DECISION

Affirmed.

The hearing officer has written a thorough decision and summary of the evidence in this case. We incorporate this decision into this decision for all purposes.

The deceased was injured on _____, while employed by (employer). It was stated during the CCH that he was "thrown" from a railroad car, and broke his back. It was also asserted that he sustained multiple other injuries, one of which was asserted by the claimant spouse and minor claimants' attorney as a "neurogenic" bladder that would not void without assistance. Both the claimant spouse and the deceased's daughter (who did not assert any entitlement to death benefits in her own behalf) said that the deceased sustained recurrent urinary tract infections.

According to the claimant spouse, the deceased complained on December 8, 1996, that he was not feeling well and needed to go to a hospital. Although living in (City 1), Texas, at the time, the deceased and claimant spouse drove all the way to (City 2) to admit him to a hospital. According to the medical records, the doctor on call at this time was Dr. F. The deceased died within 24 hours of arriving at the hospital. There was no autopsy. The death certificate signed by Dr. F stated as the causes of death "septic shock, pneumonia due to e. coli." The death certificate was filed on January 7, 1997.

The death summary completed by Dr. F on December 8th stated that the deceased was 51 years old, and that he was admitted complaining of acute onset of cough and chest congestion. (This was denied by the claimant spouse and her daughter.) A history was noted of urinary tract infections and a penile implant (elective surgery done in April 1996). Dr. F noted that it was hard to hear heart sounds due to the loud pulmonary sounds. He noted that there was an absence of breathing sounds in the left lower lobe. Cultures were obtained of sputum, blood, and urine. His electrolytes were imbalanced. The deceased developed renal failure. Dr. F noted that he and a consulting doctor concurred in the diagnosis of bacterial shock and respiratory failure. Following the deceased's death, his sputum and blood culture both grew E. coli bacteria, and his sputum also grew Klebsiella pneumoniae bacteria. On July 16, 1998, Dr. F wrote to the attorney for the claimant spouse and minor claimants and contended that E. coli was the organism that most commonly caused urinary tract infections, and that the deceased had a urinary tract infection when admitted. He contended that Klebsiella pneumoniae had been cultured from the urine, and that it was his opinion that the E. coli noted in the blood and sputum arose originally in the deceased's urinary tract. Dr. F stated in this letter that the _____, injury, which caused a neurogenic bladder and failure for it to empty properly, was a proximate cause of the death. The effect of the penile implant done earlier in the year, if any, is not discussed one way or the other.

To summarize medical evidence which preceded the date of death and admission to the hospital the day before, the deceased had a chest x-ray taken on August 5, 1994, which indicated chronic low dose silicone exposure. A letter from Dr. B, which comments on this, also notes that the deceased had bacteria in his urine, and a neurogenic bladder, but that such would not be an impediment to "his anticipated surgery." The nature of such surgery may have been spinal in nature, because there is an oblique reference in later medical records to a bone graft done in 1994 to stabilize his spine. On April 2, 1996, the deceased was found to have a fever by Dr. H, who was consulting on a preoperative examination that had been done on the deceased prior to his penile implant. Dr. H noted a palpable mass in the left lower quadrant. Dr. H counseled that such should be avoided. Dr. H stated that it was possible that the deceased could have an appendiceal abscess or some other intra-abdominal perforation. Dr. H recommended a CT scan of the abdomen. If this was done, a report is not in the record. On July 16, 1996, Dr. M noted a follow-up visit with respect to the penile implant, with nothing out of the ordinary noted. On September 19, 1996, Dr. M noted that the deceased had pain and numbness in his arms and around the shoulder girdles. A month later, Dr. M stated that the deceased's spinal problems were due to a fibril fatty vascular mass in an inaccessible portion of his lumbar spine. On November 14, 1995, the deceased received a spinal injection. On May 9, 1997, Dr. M wrote that he could not conclude that there was a probability that his work-related injury or treatment therefore was related to or caused the deceased's fulminant pneumonia and septic death.

Briefly on the matter of dependency, the claimant spouse and her daughter both testified that the daughter and the minor claimants lived rent free and with food provided in the home of the deceased and the claimant spouse, who worked at that time. The daughter also worked for the state; the minor claimants were additionally eligible for Medicaid. The claimant spouse testified that she and the deceased gave no money. Conflicting evidence was offered as to whether the minor claimants' father did, or did not, pay any child support.

Although the attorney for the claimant spouse and minor claimants notes that medical evidence about the original injury was a matter of significance to the hearing officer, the presence of such evidence was actually part of the burden of proof of the claimant spouse and minor claimants' case in chief. Because the actual death did not occur while the deceased was engaged in the course and scope of activities for his employer, and because death resulted from a disease, the death from that disease is compensable only if it naturally results from the work-related injury. See Sections 401.011(26) and (34). As thoroughly briefed by the carrier in its response, the etiology or causation of disease is most often regarded as one which must be proved through medical evidence, and cannot be developed through lay testimony, but must be established through medical evidence rising to a reasonable medical probability. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993.

We cannot agree with the claimant spouse and minor claimants that the claimant spouse was cut off from providing probative evidence that she should have been allowed to give. The hearing officer, in stating that lay testimony would ultimately not be sufficient for him to connect the death to the 1992 injuries, noted that medical evidence would be required, and instructed that his attention be drawn to medical records establishing a causal connection. At a minimum, such should have included medical records relating to the extent of the earlier compensable injuries. In any case, lay testimony was in fact brought out concerning the claimant spouse and minor claimants' theory that the deceased had chronic urinary tract infections and a neurogenic bladder. As to the medical evidence developed, which was in conflict, the hearing officer was not required to believe the recent letter from Dr. F over the opinion of Dr. M and the records in existence shortly after the death of the deceased.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). We have reviewed the medical evidence and do not agree that the hearing officer's decision that the death was not compensable, and that the claimant spouse and minor claimants are not entitled to death benefits, is against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

Likewise, the hearing officer has set out his reasoning as to a finding that the minor claimants were not eligible beneficiaries on the date of the deceased's death. We find his conclusions supported by the record developed at the CCH.

For these reasons, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge