

APPEAL NO. 991927

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 11, 1999. He (the hearing officer) determined that the Texas Workers' Compensation Commission did not have jurisdiction in this case to address an issue of compensability. The appellant (carrier) appeals this determination, contending error as a matter of law. The appeals file contains no response from the respondent (claimant/beneficiary).

DECISION

Affirmed.

This case is decided as a matter of law.

The deceased suffered a fatal injury on \_\_\_\_\_, in a fall from a tower while working in (state). A CCH was held on November 24, 1998, to address the following issue: Whether the deceased was survived by legal beneficiaries, specifically his sister, or whether death benefits should be paid to the Subsequent Injury Fund? Among the stipulations entered into by the parties was: "On \_\_\_\_\_, the Deceased was fatally injured and died in the course and scope of his employment."

The following Finding of Fact No. 4 was made: "On \_\_\_\_\_, the Deceased was fatally injured and died in the course and scope of his employment." Conclusion of Law No. 3 was stated in the same words as Finding of Fact No. 4. Consistent with the statement of the issue, this finding of fact was followed by Conclusion of Law No. 4: "[The deceased's sister] was a dependent of the Deceased and is entitled to death benefits." The decision portion of the decision and order contained the sentence: "The Deceased suffered a compensable fatal injury causing his death on \_\_\_\_\_." The order portion of the decision and order ordered the carrier to pay death benefits in accordance with its terms.

The decision and order of the hearing officer were not administratively appealed within the statutory time frame provided in Section 410.202, nor was judicial review sought. On April 1, 1999, the carrier received a toxicology report from the state of (state) which disclosed a blood alcohol content of 0.20 at the time of the fatal fall. After receiving this report, the carrier attempted to raise the issue of compensability of the injury. In doing so, it argued that the stipulation quoted above did not act as *res judicata* or otherwise bind the carrier on an issue of compensability because the legal concepts of "course and scope" and "compensable injury" are distinct. We agree that the concepts are distinct. See Sections 401.011(10) and (12). An injury can occur in the course and scope of employment and still not be compensable in the sense that the carrier is not liable for

benefits because it has successfully raised a defense to liability. One such defense is intoxication. Section 406.032.

When taken in the context of the statement of the issue at the November 24, 1998, CCH, we are hard-pressed to conclude that the stipulation was not premised on the lack of an issue of compensability. However, for purposes of this case, we accept the position of the carrier that the stipulation did not foreclose the issue of compensability. What is equally clear is that the hearing officer's decision and order, in express terms, decided that the injury was compensable and ordered the payment of death benefits, neither of which were appealed. Section 410.202 provides for appealing a "decision." Under these circumstances, regardless of the effect of the stipulation, the failure of the carrier to appeal the decision that the deceased sustained a compensable fatal injury and the order to award benefits has the effect of rendering the decision and order final and binding. Thus, we perceive no error in the refusal of the hearing officer to find jurisdiction to determine the compensability of the fatal injury. See Texas Workers' Compensation Commission Appeal No. 962238, decided January 2, 1997.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Gary L. Kilgore  
Appeals Judge