

APPEAL NO. 992812

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 10, 1999, a hearing was held. He (hearing officer) determined that deceased's compensable cervical injury of _____, was a producing cause of his death on Date of Death. Appellant (carrier) asserts that there is no medical evidence showing that deceased was taking Oxycodone as a result of his treating doctor's order, stating that deceased's last prescription for Oxycontin was provided on January 29, 1999; carrier also asserts that deceased's death is not compensable because he was not complying with his doctor's instructions at the time of his death, citing the toxic level of Oxycodone found in deceased at autopsy. The appeals file does not contain a reply from respondent (beneficiary).

DECISION

We affirm.

Deceased worked for the city of (city) on _____. Evidence indicates that deceased hurt his neck while working in the water department of the city. A medical report dated September 2, 1998, from one of the physicians who treated him, Dr. L, shows that deceased had "acute cervical radiculopathy involving the left C6 nerve root." This report describes adjusting some of deceased's medications and states, "if he has any problems we may have to switch him to Oxy-contin."

On Date of Death, an emergency medical services (EMS) crew was called to deceased's home, where deceased was found dead. An autopsy showed that "oxycodone" was found at toxic levels. (Other drugs, including Meprobamate, were found at therapeutic levels.) The conclusion reached was that deceased "died as a result of an overdose of oxycodone"; the manner of death was stated as "probably accident"; these opinions were provided by the medical examiner.

The death certificate lists the immediate cause of death as "toxic effects of oxycodone" and a block designated as "accident" was checked as the "manner of death."

Deceased's wife (beneficiary) testified that deceased was in "bad pain" at the time of his death on Date of Death. She added that the only time she knew that deceased took an "excessive amount" of his pain medication was after "he called the doctor's office" telling them he could not "get rid of his pain and they would tell him to take another one." She also said that deceased took three Oxycontin a day. She agreed that deceased had a history of alcohol abuse. She also stated that EMS had been called to their home on April 10, 1999, when deceased stopped breathing. Dr. K, who testified for carrier, said that deceased's heart was enlarged and indicated that he had had an infarct at some time.) Deceased would not agree to be taken to a hospital at that time.

Carrier states that there is no evidence that Oxycontin was prescribed due to deceased's compensable injury (pointing out that beneficiary did not offer medical records into evidence), that there was no medical evidence that "at the time of his death, he was taking this drug pursuant to doctor's orders," and that his last prescription was dated January 29, 1999, indicating that deceased "would have run out of Oxycontin by 2/20/99." Contrary to carrier's argument, the prescription records in evidence do not show that the last prescription was provided on January 29, 1999, but rather, on February 24, 1999. In addition, Dr. K, who testified on behalf of carrier, said on page 34 and 35 of the transcript that Dr. L prescribed Oxycontin for deceased on February 24, 1999. In answer to a question from carrier's lawyer which asked, "was he taking Oxycodone as a result of the compensable injury?", Dr. K answered, "as a prescribed medication, yes." Another doctor, Dr. H, who examined deceased for carrier on February 16, 1999, said that although deceased had "multiple practitioners," he primarily saw Dr. L. Dr. H makes it clear that he examined deceased for cervical and left upper extremity symptoms relative to a date of injury of _____. The only past medical history listed by Dr. H indicates that deceased has had headaches. Dr. H listed many medications, including Oxycotin, which deceased was taking and opined, "judgement should be made regarding continuation of any or all of these medications." He also alluded to deceased's regular consumption of alcohol in adding that "medication adjustments [should] be made." As stated, Dr. L's record of September 2, 1998, also mentioned that deceased may need to be "switch[ed] . . . to Oxy-Contin."

Considering all the evidence, including the medical evidence provided by carrier, the hearing officer, as sole judge of the weight and credibility of the evidence, could reasonably conclude that deceased was taking Oxycontin at the time of his death because it was prescribed by Dr. L for deceased's compensable injury. In addition to the testimony of Dr. K, Dr. H's comments could be considered to indicate that Dr. L was prescribing Oxycontin for deceased's cervical injury and also that Dr. H thought Dr. L should consider "adjusting" deceased's medication; the hearing officer did not have to interpret Dr. H's report as indicative of deceased receiving Oxycontin from some source other than a doctor, and he did not have to interpret Dr. H's report as indicating that Dr. L prescribed Oxycontin for deceased for some unnamed malady other than the compensable cervical injury. We also note that while the prescription list in evidence shows a prescription as of February 24, 1999, there was no evidence elicited that this list from this pharmacy constituted the only source of prescription medication used by deceased.

Carrier also argues about whether deceased was "taking the drug at the time of his death pursuant to doctor's orders," which we believe questions whether deceased was taking the prescribed amount during the time leading up to his death, since Dr. K testified that the amount of Oxycontin in deceased was five times the therapeutic dosage. Unless a deceased had a nurse, or similar caretaker, who gave him his medication throughout the day and night and observed him throughout the day and night, there could be no direct evidence that deceased did not take an excessive amount. There is testimony from beneficiary that deceased would call the doctor's office when his medication did not suffice and would then be authorized a higher amount. There is also evidence from Dr. K that the dosage of Oxycodone over time will not perform as well as at inception. See Texas

Workers' Compensation Commission Appeal No. 960574, decided May 3, 1996, which affirmed a determination of a compensable death based on drug ingestion even when there was some evidence that the drug taken by that deceased was for someone else. There was no finding of alcohol ingestion at the autopsy and the hearing officer made no finding that deceased was addicted to prescription medications. The hearing officer, in considering all the evidence, did not have to find that deceased purposely exceeded his doctor's prescribed medication dosage.

As stated, Dr. K also testified on cross-examination that Oxycontin (codeine or opioid) taken for a period of time makes one "drug tolerant" so that an increasing dose is needed to "get the same effect." Dr. K also said on cross-examination that he was "not refuting" the medical examiner's "finding of accidental toxicity from the overdose of Oxycontin," but did not say that he was "not disputing" the medical examiner's opinion, adding that there was not a "simple yes or no" answer to that question.

The carrier also takes issue with a finding of fact that deceased died "as a result of the collective toxic effects of numerous prescription medications," pointing out that only Oxycodone was found to be at a toxic level. However, Dr. K provided a report which shows that Oxycodone, at the level found in deceased, may be effected by other drugs taken even when the other drugs are not themselves at toxic level. He specifically mentions Meprobamate and says that by itself it would not be fatal, but such a drug could create "a 'mixed drug' co-contributory format where oxycodone was in the toxic range." We believe that the finding of fact in question does not say that other drugs ingested by deceased were found to be at toxic levels, but rather that the effect of several drugs taken together was toxic, and such a finding of fact is sufficiently supported by the report of Dr. K.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge