APPEAL NO. 002826

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 closed on November 14, 2000. The issues at the CCH were whether the decedent's fatal injury took place when he was in a state of intoxication and who were the proper legal beneficiaries of the decedent. The hearing officer determined that Appellant (beneficiary), a minor child of the decedent, was the deceased's sole proper legal beneficiary. This determination has not been appealed and has become final pursuant to Section 410.169. The hearing officer concluded that at the time of his fatal injury that the decedent was in a state of intoxication, relieving the respondent (carrier) of liability.

DECISION

Reversed and rendered.

It was stipulated that the decedent sustained a fatal injury while in the course and scope of his employment on _____. It is undisputed that the injury took place when the decedent fell off a roof while working as foreman on a construction site. The claimant was taken to Appellant _____ (subclaimant). A drug screen was performed at the subclaimant that was positive for opiates and THC, the active ingredient in marijuana. It was undisputed that the presence of opiates was accounted for by the fact that opiates would have been administered to the decedent while in transit to the hospital. No testing was performed to determine the level of THC in the decedent's system. An investigator for the carrier requested on July 14, 1998, that blood samples be preserved for further testing, but these samples were in fact destroyed on July 14, 1998. The subclaimant argued that the destruction of these samples was carried out according to the subclaimant's standard operating procedures and that the carrier's request for the preservation for these samples was not honored because the request was made to the subclaimant's risk management division as opposed to its laboratory.

Mr. C, the employer representative, testified concerning his investigation of the incident. Mr. C testified that employees of another subcontractor on the job site told him that the decedent had invited them to “burn one” at lunch. Mr. C also testified that one of the decedent's coworkers told him that the area in which the decedent's car, in which the decedent spent his lunch break on _____, was parked smelled of marijuana. Mr. C testified that his investigation also revealed that the decedent committed safety errors on _____. Statements made to police by coworkers who were eyewitnesses to the accident made no mention of marijuana or intoxication.

Dr. D, a toxicologist, testified that it was not possible to tell from the drug screen whether or not the decedent was intoxicated at the time of injury. There was also an affidavit from Dr. RD to this effect in evidence. Dr. D testified that the positive drug screen only showed that the decedent had at least 50 nanograms of THC per milliliter of urine. Dr. H, an occupational and environmental toxicologist, testified that the screen alone would

not show intoxication, but that based on evidence of recent ingestion and altered behavior he would opine that the decedent was intoxicated.

SPOLIATION

We first address the hearing officer's relieving the carrier of liability due to spoliation. The hearing officer found that since the subclaimant had "negligently if not intentionally destroyed the decedent's urine sample" that he would presume this sample would have shown the decedent was intoxicated at the time of his fatal injury. Applying spoliation in the present case is at best problematical. The carrier recognized this when it argued that the hearing officer should consider spoliation as a separate issue because even if the hearing officer found spoliation by the subclaimant he could not use such finding to deny benefits to the beneficiaries, who had nothing to do with alleged spoliation. The attorney for the beneficiary argues on appeal that to deny benefits to the beneficiary, a minor child, due to a finding of spoliation on the part of another party is not proper. We agree.

We do not find it necessary to remand the case to the hearing officer to make separate findings regarding spoliation because we simply do not find evidence to support a finding of spoliation on the part of the subclaimant. The subclaimant followed its normal operating procedures in disposing of the decedent's urine sample and we find no evidence that the subclaimant did this in any way to tamper with the evidence in this case. Absent such evidence, we find the hearing officer's application of the doctrine of spoliation in the present case to be erroneous and we reverse his findings regarding spoilation.

INTOXICATION

We have held that a drug screen alone does not necessarily prove intoxication. Texas Workers' Compensation Commission Appeal No. 950506, decided May 17, 1995; Texas Workers' Compensation Commission Appeal No. 92723, decided February 10, 1993. The carrier argues that there is more evidence in the present case than the drug screen, pointing to Mr. C's and Dr. H's testimony. While we understand that hearsay testimony is admissible in a CCH, we believe that the point can be reached where such testimony amounts to hearsay upon hearsay and is not more than mere speculation or only a scintilla of evidence. In this case, the double and sometimes triple hearsay from Mr. C, an interested witness, simply cannot support a finding of intoxication so as to trigger the necessity for the to beneficiary prove sobriety. Dr. H's opinion of intoxication is based upon the testimony of Mr. C according to Dr. H's own testimony. Under these circumstances, Dr. H's opinion is simply not reliable.

We reverse the decision of the hearing officer and render a new decision that the carrier is liable for benefits as provided by the 1989 Act as a result of the decedent's fatal injury.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge