APPEAL NO. 002871

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 commenced on February 2, 2000, with additional sessions on April 12, 2000, and September 21, 2000. The record was left open for written closing arguments and was closed on November 3, 2000. There were several benefit review conferences and a number of issues at one time; however, the only two appealed issues dealt with the extent of injury (was the compensable injury "the producing cause") of two strokes and the ultimate death of the decedent; and whether the respondent (carrier) had timely contested compensability of the claimed injury. In regard to those issues, the hearing officer determined that the decedent's _____, compensable (left wrist) injury was "not a producing cause of either of [the decedent's] strokes in 1994 or his death on _____," and that the carrier "did not waive the right to contest the compensability of either of the decedent's strokes because it was not required to do so."

The appellant (claimant/beneficiary; decedent's spouse) appealed, arguing first that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) "should be applied to this case"; that Rule 124.3(c) was not in effect when the CCH in this case was convened; that the carrier had written notice of the claimed injury in a report of April 26, 1994, or, in the alternative, in a letter dated January 1, 1996; and that, regarding the extent of injury, "the sudden release of adrenaline from stress" caused by the carrier's denial of income benefits caused "massive hypertension" which, in turn, caused two strokes in 1994 and the decedent's eventual death in _____. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responds, citing evidence in support of its contention that the claimant's theory of causation is not supported by scientific evidence and that Rule 124.3 provides that "there can be no waiver on the extent of an injury"; or, in the alternative, that there was no waiver, and requests affirmance.

DECISION

Affirmed.

The decedent had been a laborer and on _____, tripped over a pipe, fell and broke his left wrist. The parties stipulated that the decedent sustained a compensable left wrist injury on that date. The carrier began paying benefits. On March 2, 1994, the decedent, then 52 years of age, suffered a left intra-cerebral hemorrhage (the minor first stroke) and was treated at (C Hospital). Dr. X, decedent's treating doctor at the time, subsequently found the decedent to have reached maximum medical improvement with a zero percent impairment rating (for the left wrist) on March 31, 1994, and the carrier stopped paying benefits. The decedent subsequently had another, second, more serious, stroke on August 31, 1994. The decedent was eventually taken back home to a remote mountain village in Mexico, where he died on _____. The claimant asserts that the decedent's painful wrist injury and the carrier's refusal to pay further benefits caused hypertension which, in turn, caused the strokes (or at least the second stroke) and

decedent's eventual death. The claimant's position is supported by Dr. C, who began treating the decedent in April 1994, and Dr. DH. There was testimony and evidence to the contrary from Dr. H who testified that fractures do not normally cause strokes and he attributes the decedent's strokes to the risk factors of age, hypertension and alcohol abuse (denied by the claimant and other witnesses). Dr. H and Dr. T agreed that stress was a factor in the strokes. In short, the medical evidence was conflicting and subject to different interpretations. The hearing officer found that the medical evidence did not establish, in reasonable medical probability, a causal connection between the decedent's compensable _____ left wrist injury and either the March 1994 or August 1994 strokes or the decedent's death in _____. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We find the hearing officer's decision on this issue supported by the evidence.

The main thrust of the claimant's appeal is that the carrier has waived its right to contest compensability of the strokes in that the carrier did not "dispute" (contest compensability) the claims within 60 days of receiving written notice of the claim pursuant to Rule 124.6, which was in effect when the CCH was convened (however, it was repealed on March 13, 2000, and was not in effect when the hearing officer closed the record on November 2, 2000). The hearing officer found that the carrier received written notice of the decedent's March 1994 stroke in a "Closure Report" on April 26, 1994, but that report does not contain "facts showing and/or asserting the compensability" of the March 1994 stroke. (*See* Rule 124.1(a)(3)). We find the hearing officer's determination on that point supported by the evidence. However, also in evidence is the claimant's attorney's January 1, 1996, letter which, arguably, does meet the requirements of written notice in Rule 124.1. The hearing officer does not address that correspondence, principally because it was not emphasized at the CCH.

The claimant contends that Rule 124.6(c) provides that if a carrier disputes compensability after payment of benefits have begun, it must do so within 60 days after the carrier has received written notice of the additional claimed injury. The claimant concedes that Rule 124.6 "has been modified" (actually repealed) by Rule 124.3(c), which has an effective date of March 13, 2000, and which is after the CCH was convened on February 2, 2000.

Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Rule 124.3(c) provides, in part, that Section 409.021 and subsection (a) of Rule 124.3 "do not apply to disputes of extent of injury." The preamble to Rule 124.3 and the repeal of Rule 124.6

provide guidance on how the Texas Workers' Compensation Commission (Commission) intends Rule 124.3 to apply.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 001224, decided July 5, 2000, and portions of the preamble, as authority for her decision. The claimant asserts that Appeal No. 001224 violates her due process and that a claimant "cannot be subjected to a rule that comes into effect after the [CCH] is convened." We disagree. The Commission has made clear that the Appeals Panel's interpretation of Rule 124.6 was not what the Commission intended. Consequently, we decline to retroactively apply Rule 124.6 and, given the Commission's construction of Section 409.021 as set forth in the preamble to Rule 124.3, and notwithstanding that Rule 124.3 did not become effective until March 13, 2000, we affirm the hearing officer's decision on this issue. *See also* Texas Workers' Compensation Commission Appeal No. 001520, decided August 14, 2000, which held:

> In Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, we determined that the [Commission] cannot impose a waiver in an extent-of-injury case given the essential rationale expressed by the Commission in the preamble to Rule 124.3 to the effect that the Commission construes Section 409.021 as not providing for waiver of extent of injury.
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> The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Philip F. O'Neill
Appeals Judge