

APPEAL NO. 010335

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 5, 2001. The record was closed on January 12, 2001. The hearing officer held that the decedent's _____, hand injury did not extend to or include reflex sympathetic dystrophy (RSD) or migraine headaches; that the decedent's death on May 18, 2000, was not a result of his compensable injury; and that the respondent (carrier) did not waive the right to dispute the compensability of the death of the decedent.

The decedent's beneficiaries (claimants) have appealed, arguing that the decision is against the great weight and preponderance of the evidence. The claimants argue that the case of Downs v. Continental Casualty Co., 32 S.W.3d 260 (Tex. App.-San Antonio 2000, *rehearing overruled November 15, 2000*) compels a waiver by the carrier in this case because the death was not disputed within seven days. The carrier responds that it believes the appeal may have been untimely, and that the decision should otherwise be affirmed.

DECISION

We affirm the hearing officer's decision.

The hearing officer's decision fairly discusses the evidence and we will not extensively repeat the facts here. We have reviewed the record and find that the appeal was timely filed by the claimant.

WAIVER ISSUE

The hearing officer did not err in holding that the carrier did not waive its dispute to the compensability of the death. The Texas Workers' Compensation Commission (Commission) is not applying the Downs decision seven-day period pending continuing legal action on this case. The hearing officer's finding that the carrier disputed the death within 60 days of written notice of that alleged compensable injury is supported by the record in this case.

While the claimant argues that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.17(f) (Rule 132.17(f)), effective March 13, 2000, compels a waiver in this case similar to that imposed by the court in Downs, we disagree. As the hearing officer noted, the Downs court did not construe Rule 132.17, which clarified and in a few instances replaced many of old Rule 124.3 pertinent provisions. The preamble to the adopted Rule 132.17, found at 25 Tex. Reg. 2110-2113, makes clear that the Commission intended to preserve a 60-day time frame for investigating and disputing the compensability of a death, while providing that where the only question is entitlement or identity of claimants as beneficiaries, a seven-day reaction time is allowed. Waiver is imposed under the rule as the penalty only when the notice of denial is not filed by the 60th day. Rule 132.17(b).

This is especially clear at 25 Tex. Reg. 2113, which states:

As indicated previously, the carrier needs more than seven days up front to evaluate the compensability of the claim. However, once the carrier has had this opportunity, the only issue left is whether or not a person is entitled to receive death benefits . . . several other rules in Chapter 132 establish the manner in which a potential beneficiary is to make a claim of entitlement and list the documentation that is to be provided to the carrier. Once this documentation is received, the carrier should within seven days be able to either accept or dispute the person's claim. Therefore, §132.17 has been revised to clarify that it does not reduce the carrier's opportunity to review compensability of the claim.

This is why subsection (f)(1)(C) of the rule provides that the payment of benefits should begin the seventh day after the **latest** of either a claim or resolution of compensability. Because the hearing officer has factually found that the dispute to compensability was filed within the 60-day period, and that dispute has resulted in this hearing, the seven-day period discussed under Rule 132.17 is not triggered unless and until a final adjudication of compensability of the death is made. Regardless of how it came to the Commission, the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) of the carrier is plainly stamped as filed on October 4, 2000, which is within 60 days of the notice of the death claim, which supports the hearing officer's decision.

EXTENT OF INJURY TO RSD AND MIGRAINES

The hearing officer did not err in finding that the decedent's hand injury did not extend to RSD or migraine headaches. We note that the claimants presented only documentary evidence and no witnesses. The only witnesses were two doctors who had reviewed the medical records of the decedent's treatment and death and questioned the existence of RSD and migraine headaches, as well as the conclusion that it was a narcotics overdose that led to the decedent's death. The decedent had undergone examination under the influence of Sodium Pentothal when he was observed outside the medical clinic using his right hand in a manner that he contended he could not do when in medical consultation. The doctor who performed this test, Dr. D, concluded on October 18, 1999, that the decedent had no somatic cause for right forearm and hand pain. Against this were his treating doctors' assertions that he had RSD as a result of his hand injury, and migraine headaches also as a result of hand pain.

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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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).

COMPENSABILITY OF THE DEATH

Finally, the determination that the decedent did not have RSD and migraine headaches (nor were same related to his compensable injury) resolves the matter of whether the death relating to prescriptions for such conditions is compensable. However, even if the hearing officer had agreed that the decedent had RSD and had been prescribed pain relief for this condition, compensability does not become a given. We have before held that noncompliant use of prescription drugs resulting in injury does not constitute injury due to reasonable and necessary medical treatment for a work-related injury. Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993. Leaving aside that the hearing officer found that the conditions for which narcotics were prescribed were not part of the compensable injury, the lack of information about what the prescribed levels in this case were at the time of death, coupled with some medical evidence that the decedent's use of hydrocodone containing substances was noncompliant, supports the hearing officer's decision in this case. We do not read Texas Workers' Compensation Commission Appeal No. 960574, decided May 3, 1996, which was an affirmance of a fact finder's resolution of conflicting evidence, to compel a reversal in this case.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge