APPEAL NO. 011011
FILED JUNE 20, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 29, 2001, with the record closing on February 26, 2001, the hearing officer resolved the disputed issues by concluding that the death of (decedent) on _____, was not compensable and was not in the course and scope of his employment; that the decedent's death was not a result of his wilful intention to injure himself; and that the appellant/cross-respondent (carrier) did not waive its right to contest the compensability of the claimed fatal injury as it timely contested the compensability of the fatality under Section 409.021(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(b) (Rule 124.6(b)). The carrier appeals, contending that the great weight of the evidence establishes that the decedent's death did result from his willful intention to injure himself. The carrier also requests that our decision correct the name of the decedent's employer. The response of the respondents/cross-appellants (claimant beneficiaries) urges the sufficiency of the evidence to support the hearing officer's intentional injury determination. The claimant beneficiaries do not oppose the request to change the name of the employer and in fact refer to the employer by the requested name in their response. The claimant beneficiaries have appealed for evidentiary insufficiency the determination that the decedent was not fatally injured in the course and scope of his employment. The claimant beneficiaries also assert that the hearing officer erred in determining that the carrier did not waive its right to contest the compensability of the claimed fatal injury citing Downs v. Continental Casualty Company, 32 S.W.3d 260 (Tex. App.-San Antonio, 2000, writ granted). The carrier's response urges the sufficiency of the evidence to support the intentional injury determination and contends that the Downs decision was wrongly decided.

DECISION

Affirmed in part; reformed in part; and reversed and remanded in part.

The essential facts in this tragic case are not in dispute. In the midafternoon of December 2, 1999, the decedent, a truck mechanic for a business operating approximately 200 dump trucks, was dispatched to repair a disabled truck at a location at least an hour's drive away; he made the repair and left that location to return to the employer's yard at between 5:00 p.m. and 5:30 p.m. In the meantime, Mr. S, a truck driver, dumped his last load at about 2:35 p.m. and returned dump truck No. 401 to the employer's yard. He completed the postdrive inspection sheet indicating no problems with the truck, requested no mechanical service, and went home. Late in the afternoon, two coworkers waited in an office to ride home with the decedent, eventually saw the pickup truck the decedent used for the road service call parked in the yard but did not see the decedent, and departed the premises. The next morning, _____, Mr. S reported for work and discovered the claimant's body next to No. 401's truck bed with his neck crushed between the truck bed and the truck frame.

Mr. O, the employer's vice-president for operations, testified that it was dark and had been raining the previous night when the decedent would have returned from his service run; that the area in the yard where No. 401 was parked by Mr. S was poorly lit and muddy; that no tools or lighting devices were found near the decedent; that neither the other truck mechanic on the premises nor the shop foreman had been advised of any problems with No. 401; that there was no need for any repairs or maintenance to be performed on No. 401 by the decedent; that were any repairs or maintenance necessary, the truck would have been pulled into the lighted and covered shop where the tools are located; and that Mr. S operated No. 401 after the decedent's body was discovered and experienced no mechanical problems. Mr. O also stated that below the truck near the decedent's left hand was a cable which, when pulled, allows the truck bed to descend to the frame and that a portion of the cable was free of the caked mud covering the rest of the cable. The report of the investigation by the U.S. Occupational Safety and Health Administration stated that this agency determined that the death may have been a possible suicide and that it was being investigated by the police. The police investigation report stated that the decedent's death appeared to be a suicide with the action of the truck bed appearing to have been self-inflicted.

The claimant beneficiary testified that she and the decedent had been married 16 years, had three daughters and a new grandchild, and looked forward to someday moving to the Valley to be closer to Mexico where they were building a house. She knew of no reason why the decedent would take his own life and did not think he was depressed but conceded that she "don't even know how depression looks like."

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the hearing officer's determination that the claimant beneficiary failed to prove that the decedent's fatal injury occurred in the course and scope of his employment is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and it is affirmed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the intentional injury issue, Section 406.032(B) provides, in part, that an insurance carrier is not liable for compensation if the injury was caused by the employee's wilful attempt to injure himself. As with the other exceptions to liability in Section 406.032, the carrier had the burden to raise an issue of intentional self injury with probative evidence and, if raised, the claimant beneficiary had the burden to prove that the injury was not intentional. The Texas law with regard to suicide and compensability is set out in Texas Employers' Insurance Association v. Gregory, 521 S. W. 2d 898 [(Tex. App.-Houston [14th Dist.] 1975, rev'd 530 S.W.2d 105 (Tex. 1975), and has been followed in Texas Workers' Compensation Commission Appeal No. 91047, decided November 20, 1991; Texas Workers' Compensation Commission Appeal No. 93135, decided April 8, 1993; and Texas Workers' Compensation Commission Appeal No. 002210, decided

November 10, 2000. In the case we consider, the hearing officer clearly stated that at the outset of the hearing that she was placing the burden of proof on the carrier to prove the intentional injury exception. The hearing officer never referred to the burden being on the carrier only to raise an issue on the exception and then shifting the burden to the claimant beneficiary to prove the death was not a suicide nor did she make any findings in this regard. Because the hearing officer did not correctly apply the law concerning the burden of proof on the intentional injury exception, we reverse her determinations regarding that issue and remand the case for further consideration and findings and conclusions consistent with this decision.

Finding of Fact No. 1A is reformed to reflect that the decedent was an employee of (employer). We decline to disturb the hearing officer's determination of the carrier waiver issue based on the Downs argument asserted by the carrier. *See* TWCC Advisory 2001-02, effective February 20, 2001. Texas Workers' Compensation Commission Appeal No. 002763, decided January 10, 2001.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I write separately only to note that while the hearing officer at the contested case hearing (CCH) stated she placed the burden of proving the intentional injury exception on the carrier, the hearing officer's findings and decision make no reference to the two-step process involved in exceptions to liability provisions. As the majority decision notes, in Texas Employers' Insurance Association v. Gregory, 521 S.W.2d 898 (Tex. App.-Houston [14th Dist.] 1975, rev'd 530 S.W.2d 105 (Tex. 1975), the court cites authority for the proposition that there is a legal presumption against suicide, which has been characterized as a "true presumption," which falls or disappears once rebutted. The hearing officer could correctly initially place the burden of rebutting the presumption against suicide on the carrier but then must determine whether the evidence has "conclusively rebutted" that presumption. If the presumption has been rebutted then the burden falls on the claimant to show that the decedent had not committed suicide.

The hearing officer makes a finding that the "claimed injury was not a result of the claimant's [sic decedents] intention to injure himself" and that there was "insufficient evidence to establish that the claimant [sic decedent] had any motive to injure himself." I believe that finding could be read as saying that the carrier had not conclusively rebutted the presumption against suicide. However, because the hearing officer made no reference to the two-step process and only generally placed the burden on the carrier, I concur in the remand for the purposes of clarification. The question of whether the carrier has conclusively rebutted the presumption against suicide is a factual determination within the province of the hearing officer to resolve. Accordingly, I concur in a remand so that the hearing officer can clarify that she was aware of the two-step process and that if, and only if, the carrier had successfully rebutted the presumption against suicide would the burden of proving that decedent's death was not suicide shift to the claimant.

Thomas A. Knapp
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge