

APPEAL NO. 031181
FILED JULY 2, 2003

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 held on April 8, 2003. The hearing officer resolved the disputed issues by deciding that: (1) (decedent) sustained a compensable injury on _____; (2) that the compensable injury of _____, extends to and includes the herniated nucleus pulposus (HNP) L4-5 and L5-S1; (3) that the compensable injury of _____, does not extend to or include seizures; (4) that the decedent's death was not a result of the compensable injury sustained on _____; (5) that the respondent/cross-appellant (carrier) is not relieved from liability under Section 409.002 because the decedent timely notified his employer pursuant to Section 409.001; (6) that the carrier has waived the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and (7) that the decedent had disability from January 27, 2001, through January 18, 2002.

The appellant/cross-respondent (claimant/beneficiary) appealed, disputing the determinations that: (1) the compensable injury did not extend to include seizures; (2) that the decedent's death was not a result of the compensable injury; and (3) that disability ended on January 18, 2002. The appeal file does not contain a response from the carrier. The carrier appealed, arguing that the determinations: (1) that the decedent sustained a compensable injury; (2) that the decedent timely reported his injury; (3) that the carrier waived its right to contest compensability; (4) that the compensable injury extended to include HNP L4-5 and L5-S1; and (5) that the decedent had disability from January 27, 2001, through January 18, 2002, are against the great weight and preponderance of the evidence. In her appeal, the claimant/beneficiary urged affirmance of the determinations disputed by the carrier.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

Finding of Fact No. 9 is reformed as follows to correct a typographical error in the ending date of disability: "Due to the work injury, decedent was not able to obtain and retain employment at his pre-injury wage from January 27, 2001 through January 18, 2002."

INJURY, EXTENT OF INJURY, NOTICE, & DISABILITY

The hearing officer did not err in determining that the decedent sustained a compensable injury on _____; that the compensable injury extends to include the HNP L4-5 and L5-S1 but does not extend to or include seizures; that the decedent timely reported the claimed injury to his employer; and that the decedent had disability from January 27, 2001, through January 18, 2002. The claimant/beneficiary had the

burden of proof on those issues. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The compensable injury, extent-of-injury, timely reporting, and disability issues presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In this instance, the hearing officer was persuaded that there was evidence that supported a back injury while in the course and scope of employment and that the herniation of the lumbar spine was related to the work injury. The hearing officer noted in her Statement of the Evidence that the medical records never related the decedent's seizures to his work injury. The hearing officer was persuaded that the decedent notified his employer within 30 days of the date of injury.

The claimant/beneficiary contends that the decedent's release to work on January 18, 2002, was from a nontreating doctor and that the hearing officer should not have found that release to end disability. The record reflects that the doctor who released the decedent on January 18, 2002, was the doctor who performed the decedent's back surgery on September 11, 2001. Further, the hearing officer noted that there was no evidence of continued medical treatment for the decedent's back after his release. Nothing in our review of the record demonstrates that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse those determinations on appeal. Pool, supra; Cain, supra.

WAIVER

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within 7 days of first receiving written notice of an injury or waive its right to dispute compensability. See Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380, decided April 10, 2003. The hearing officer noted that there was no evidence of any dispute filed within 7 days nor was there evidence that any payments had been made as accrued. There is sufficient evidence to support the hearing officer's determination that the carrier waived its right to dispute the compensability of the claimed injury. The claimant/beneficiary argues that since no Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed, that the extent-of-injury issue has also been waived. We note that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) that Section 409.021 does not apply to disputes of extent-of-injury. See Texas Workers' Compensation Commission Appeal No. 023106, decided

January 22, 2003. Although Rule 124.3(c) states that Section 409.021 does not apply to an "extent-of-injury" dispute, the rule cannot be interpreted in a way that would simply allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby read the mandates of Section 409.021 out of existence entirely. Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002. However, the claimant/beneficiary did not establish that at the time when the carrier received notice of injury in this case, there existed discoverable evidence that would put the carrier on notice that the seizures were being related to the compensable back injury. Therefore, we perceive no error in this regard.

DEATH BENEFITS

The claimant/beneficiary argues that the hearing officer applied the wrong legal standard in determining whether the decedent's death was a result of the compensable injury. The evidence reflected that the decedent committed suicide on (date of death). The hearing officer noted that there was a history of depression prior to the compensable injury and that the decedent had been released to return to work two months prior to the date of his death. The claimant/beneficiary had the burden of proof on the disputed issue. At issue in this case was whether the decedent's suicide was a result of the compensable injury. Section 401.011(26) defines injury as damage or harm to the physical structure of the body "and a disease . . . naturally resulting from the damage or harm." In Texas Workers' Compensation Commission Appeal No. 961449, decided September 9, 1996, we addressed the "proper standard" for determining whether a claimant's psychological condition is the result of a physical compensable injury. There, we cited Texas Workers' Compensation Commission Appeal No. 950749, decided June 21, 1995, for the proposition that although a psychological problem may not have arisen "but for" the physical injury, that alone is not sufficient to establish the compensability of the psychological condition. Rather, we quoted Texas Employers Insurance Association v. Wilson, 522 S.W.2d 192, 195 (Tex. 1975) as follows:

[i]t therefore must be concluded that although the claimant may be disabled by reason of a neurosis traceable in part to *circumstances* arising out of and immediately following his injury, there must be a finding that the neurosis was the result of the injury. [Emphasis in the original.]

The hearing officer applied the correct legal standard in her analysis regarding general compensability of psychological conditions. However, we must also address waiver regarding death benefits. The parties litigated the issue of whether the suicide was a result of the compensable injury and the claimant also argued at the hearing that the carrier waived the right to contest compensability regarding the suicide. Rule 132.17(a) provides that, upon being notified of a death resulting from an injury, the carrier shall investigate whether the death was a result of the injury, and if the carrier has not already done so in compliance with Rule 124.3 due to the injury being reported separately, conduct an investigation relating to the compensability of the death, the carrier's liability for the death, and the accrual of benefits. Rule 132.17(b) provides that, if the carrier believes that it is not liable for the death, or that the death was not

compensable, the carrier shall file the notice of denial of a claim in the form and manner required by Rule 124.2. Rule 132.17(b) further provides that if the notice of denial is not filed by the 60th day as required, the carrier may not raise an issue of compensability or liability, and is liable for any benefits that accrued. In the instant case, the hearing officer found that the carrier had notice of a work-related injury by August 23, 2002. In the request for a benefit review conference dated August 23, 2002, the claimant beneficiary contended that the decedent killed himself because he was despondent over his medical and financial circumstances from the injury. Further, the amended Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated October 4, 2002, listed "back, death" as the body parts affected and listed the nature of injury as "herniated disc/surgery/suicide." The carrier acknowledged at the hearing that it did not have knowledge of the claim until after the decedent's death. The claimant/beneficiary argued at both the CCH and on appeal that the carrier never filed a TWCC-21 in regard to any matter in this case. The record does not contain any evidence that a denial was filed by the carrier in accordance with Rule 132.17. Therefore, although the evidence supports the factual determination that the decedent's death was not the result of the compensable injury sustained on _____, the carrier's failure to file a notice of denial of the claim prevents the carrier from disputing an issue of compensability or liability for the decedent's death. Accordingly, we reverse the determination that the decedent's death was not a result of the compensable injury sustained on _____, and render a decision that the carrier is liable for any benefits that accrued as a result of the decedent's death in accordance with the 1989 Act.

The hearing officer's decision and order is affirmed as reformed in part and reversed and rendered in part.

According to the information provided by the carrier, the true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge