

APPEAL NO. 090425
FILED JUNE 4, 2009

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 February 20, 2009. The disputed issues before the hearing officer were:

1. Was the deceased in the course and scope of his employment when involved in a fatal motor vehicle accident (MVA) on _____?
2. Is [respondent (claimant beneficiary)], minor daughter of the deceased, a proper legal beneficiary of [the deceased] entitling her to death benefits?

The hearing officer resolved the disputed issues by determining that: (1) the deceased was in the course and scope of his employment when involved in a fatal MVA on _____; and (2) the claimant beneficiary, minor daughter of the deceased, is a proper legal beneficiary of the deceased entitling her to death benefits.

The appellant (carrier) appealed the hearing officer's determination on course and scope of employment and requested that the Appeals Panel reverse and remand the case for the hearing officer to consider medical records obtained by the carrier after the hearing officer had issued the decision and order. The claimant beneficiary responded, urging affirmance and objecting to the documents attached to the carrier's appeal. The determination that the claimant beneficiary, minor daughter of the deceased, is a proper legal beneficiary of the deceased entitling her to death benefits was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

It was undisputed that the deceased was fatally injured in a MVA on _____, while driving to an out-of-state jobsite.

Attached to the carrier's appeal are two exhibits, "A" and "B." Exhibit "A" is the (County Name) County Medical Examiner's Report of Autopsy signed by the Deputy Medical Examiner on March 10, 2009. The autopsy was performed and laboratory specimens were drawn on August 6, 2008. Attached to the autopsy report is a comprehensive toxicology analysis which states there is a presence of marijuana, both THC and its metabolite THC-COOH, in the deceased's blood. There is also a urine test that is positive for the presence of cannabinoids. Exhibit "B" is a peer review report dated March 20, 2009, by (Dr. K) performed at the request of the carrier. Dr. K opined that based on his review of the autopsy and the toxicology analysis that the deceased was intoxicated at the time of the fatal MVA on _____. We note that Section

406.032(1)(A) provides that the carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication.

In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the CCH, whether it is cumulative of other evidence of record, whether it was not offered at the CCH due to the lack of diligence, and whether it is so material that it would probably result in a different decision. Appeals Panel Decision (APD) 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We believe in this case, the March 10, 2009, autopsy report with the attached toxicology analysis came to the knowledge of the carrier after the CCH, that it is not cumulative of other evidence of record, that it was not due to lack of diligence that it was not offered at the CCH, and that it is so material that it would probably result in a different decision. The carrier has provided newly discovered evidence on appeal where a remand is warranted based on that evidence. Accordingly, we reverse the hearing officer's determination that the deceased was in the course and scope of his employment when he was involved in a fatal MVA on _____, and we remand the case to the hearing officer for further consideration.

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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge