

APPEAL NO. 091309
FILED OCTOBER 30, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case returns following our remand in Appeals Panel Decision 090425, decided June 4, 2009, for consideration of newly discovered evidence. A hearing on remand was held on July 28, 2009. The hearing officer resolved the disputed issues by deciding that: (1) the decedent was in the course and scope of employment at the time he was involved in a fatal motor vehicle accident (MVA) on _____; and (2) the claimed injury did not occur while the decedent was in a state of intoxication as defined by Section 401.013 and the appellant (carrier) is not relieved of liability for compensation.

The carrier appealed, disputing both the determinations of course and scope of employment and intoxication. The respondent (claimant beneficiary) responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the decedent was killed in a MVA on _____. He and another employee were in an employer-owned vehicle traveling to a job site in (City), (State).

COURSE AND SCOPE OF EMPLOYMENT

The hearing officer's determination that the decedent was in the course and scope of employment at the time he was involved in a fatal MVA on _____, is supported by sufficient evidence and is affirmed.

INTOXICATION

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. Section 401.013(a)(2)(B) defines intoxication as not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance or controlled substance analogue as defined by Section 481.002 of the Health and Safety Code. Section 401.013(c), amended effective September 1, 2005, provides that on the voluntary introduction into the body of any substance listed under Subsection (a)(2)(B), based on a blood test or urinalysis, it is a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties. In cases involving controlled substances, there is no level or test defined by the statute that establishes per se if a person has lost use of his or her physical and mental

faculties. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 115 (Tex. App.-Beaumont 2005, pet. denied).

In this case, a toxicology screen was performed along with an autopsy of the decedent and was admitted into evidence at the hearing on remand. The toxicology screen reflects that the decedent tested positive in both a post-mortem blood test and urinalysis for marijuana metabolites. A physician expert witness, (Dr. P), testified and submitted a written report on behalf of the claimant beneficiary, citing a textbook on forensic pathology, stating “drug levels in postmortem exams is totally invalid when testing for cannabis (THC) and its metabolites due to the rapid redistribution from storage tissues such as fat in the body.” It was undisputed that the date of death of the decedent was _____, and that the blood and urine specimens collected for the toxicology screen were collected on August 6, 2008. A medical doctor also testified and submitted a written report on behalf of the carrier, opining that the manner of testing supports that the presence of marijuana was from use and that marijuana is an illicit substance, the use of which alters normal functioning. The hearing officer noted in the Background Information portion of his decision and order that the blood test is sufficient to raise a rebuttable presumption that the decedent is intoxicated. The hearing officer further stated that Dr. P concluded that the post-mortem tests in this case are invalid and cannot be used to determine the time of marijuana consumption, the quantity, or the state of one’s ability to drive.

However, pursuant to Section 401.013(c), the introduction of a positive blood test or urinalysis creates a rebuttable presumption that the decedent was intoxicated and did not have the normal use of his mental or physical faculties. The burden of proof then shifted to the claimant beneficiary to prove the decedent was not intoxicated at the time of his injury. The other employee involved in the MVA did not testify. No one testified that they saw the claimant prior to the MVA to give an opinion regarding whether the decedent had the normal use of his mental or physical faculties. In evidence was a state of (State) uniform crash report, which indicated that witnesses stated the claimant’s vehicle while traveling westbound drifted into eastbound traffic lanes. While Dr. P testified that in his opinion the post-mortem toxicology screen was invalid, he did not present any evidence that the decedent had the normal use of his mental or physical faculties at the time of the MVA, but rather, as noted by the hearing officer, concluded the tests cannot be used to determine the time of marijuana consumption, the quantity ingested, or the state of one’s ability to drive. The claimant beneficiary did not rebut the presumption of intoxication raised by the positive drug test. There is no evidence that the decedent had the normal use of his mental or physical faculties. The hearing officer’s determination that the claimed injury did not occur while the decedent was in a state of intoxication is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, the hearing officer’s determination that the claimed injury did not occur while the decedent was in a state of intoxication as defined by Section 401.013 and the carrier is not relieved of liability for compensation is reversed and a new decision is rendered that the claimed injury occurred while the decedent was in state of intoxication as defined by Section 401.013 and the carrier is relieved of liability for compensation.

SUMMARY

We affirm the hearing officer's determination that the decedent was in the course and scope of employment at the time he was involved in a fatal MVA on _____.

We reverse the hearing officer's decision that the claimed injury did not occur while the decedent was in a state of intoxication as defined by Section 401.013, and the carrier is not relieved of liability for compensation and a new decision rendered that the claimed injury occurred while the decedent was in state of intoxication as defined by Section 401.013 and the carrier is relieved of liability for compensation.

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.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge