

APPEAL NO. 111732
FILED JANUARY 30, 2012

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 October 20, 2011, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) (decedent's) death was not a result of the compensable injury sustained on [date of injury]; (2) the [date of injury], compensable injury extends to vertigo, seizures, aspiration, dysphasia, dysphagia, tremors, and Parkinsonian symptoms; (3) the [date of injury], compensable injury does not extend to brain atrophy and dementia pugilistica; (4) [Dr. F] was not properly appointed as a designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 127.5 (Rule 127.5) to address the issue of extent of injury; and (5) the respondent/cross-appellant (self-insured) filed its dispute for death benefits in a timely manner pursuant to Rule 132.17.

The appellant/cross-respondent (claimant beneficiary) appealed, disputing the hearing officer's determinations that: Dr. F was not properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5 to address the extent of injury; the compensable injury does not extend to brain atrophy and dementia pugilistica; the self-insured filed its dispute for death benefits in a timely manner pursuant to Rule 132.17; and that the decedent's death was not a result of the compensable injury sustained on [date of injury]. The self-insured responded, urging affirmance of the determinations appealed by the claimant beneficiary.

The self-insured also filed a cross-appeal, disputing the hearing officer's determination that the compensable injury of [date of injury], extends to vertigo, seizures, aspiration, dysphasia, dysphagia, tremors, and Parkinsonian symptoms. The appeal file does not contain a response from the claimant beneficiary to the self-insured's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the decedent sustained a compensable injury on [date of injury], and the event of [date of injury], resulted in some form of traumatic brain injury. However, the extent of the severity of the brain injury was in dispute. The decedent was injured on [date of injury], when he fell off the top of the ladder and sustained numerous injuries including a skull fracture, fracture of the right orbit, and a pelvis fracture. It was undisputed that the decedent died on [dammiate of decedent's death].

The hearing officer's determinations that: the [date of injury], compensable injury extends to vertigo, seizures, aspiration, dysphasia, dysphagia, tremors, and Parkinsonian symptoms and that the [date of injury], compensable injury does not extend to brain atrophy and dementia pugilistica are supported by sufficient evidence and are affirmed.

An issue listed in the benefit review conference report and the decision and order is as follows: Was Dr. F appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5? However, we note the issue that was actually litigated was limited to the appointment of Dr. F specifically on the issue of extent of the compensable injury. The hearing officer's determination that Dr. F was not properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5 to address the issue of extent of injury is supported by sufficient evidence and is affirmed because Section 408.0041(a) provides in part that a designated doctor's examination be used to resolve an extent of injury question and Dr. F cannot examine the decedent to resolve the extent of his compensable injury after the decedent's death.

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 and shall initiate benefits in accordance with this section.

The hearing officer found that the claimant beneficiary filed her claim for death benefits with the Texas Department of Insurance, Division of Workers' Compensation (Division) on January 18, 2011. However, there is no evidence in the record that the claim for death benefits was filed with the Division on January 18, 2011. The 60 day time limit imposed by Rule 132.17 is triggered upon notice to the carrier, not the date the claimant filed for death benefits with the Division.

In evidence is a facsimile transmission (fax) confirmation which reflects that correspondence, including the Notice of Fatal Injury or Occupational Disease and Claim for Compensation for Death Benefits (DWC-42) from the claimant beneficiary's attorney was sent and received by fax to the third party administrator of the self-insured on

January 14, 2011. The self-insured acknowledged in its response to the claimant beneficiary's appeal that the DWC-42 "was not filed until January 14, 2011."

The hearing officer found that the self-insured timely filed its Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN-11) disputing death benefits with the Division on March 16, 2011. In evidence is the self-insured's dispute (listing its third party administrator) dated March 15, 2011, but was file stamped as received by the Division on March 16, 2011. The self-insured acknowledges in its response to the claimant beneficiary's appeal that it filed its dispute concerning the claim for death benefits on March 16, 2011. The self-insured maintains that "[t]he 60th day following January 14, 2011, was March 16, 2011, thereby making the dispute timely filed." However, the 60th day following January 14, 2011, is March 15, 2011. The self-insured needed to file its dispute on or before March 15, 2011, to be timely and failed to do so. The self-insured filed its dispute on March 16, 2011.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's determination that the self-insured filed its dispute for death benefits in a timely manner pursuant to Rule 132.17 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We reverse the hearing officer's determination that the self-insured filed its dispute for death benefits in a timely manner pursuant to Rule 132.17 and render a new decision that the self-insured did not file its dispute for death benefits in a timely manner pursuant to Rule 132.17.

The hearing officer found that the decedent's death was not a result of the compensable injury sustained on [date of injury]. Although the evidence supports the factual determination that the decedent's death was not the result of the compensable injury sustained on [date of injury], the self-insured's failure to timely file a notice of denial of the claim prevents the self-insured from disputing an issue of compensability or liability for the decedent's death. Accordingly, we reverse the hearing officer's determination that the decedent's death was not a result of the compensable injury sustained on [date of injury], and render a new determination that the decedent's death was a result of the compensable injury sustained on [date of injury], by virtue of carrier waiver pursuant to Rule 132.17(a) and (b). See Appeals Panel Decision 110391, decided June 2, 2011.

SUMMARY

We affirm the hearing officer's determination that the [date of injury], compensable injury extends to vertigo, seizures, aspiration, dysphasia, dysphagia, tremors, and Parkinsonian symptoms.

We affirm the hearing officer's determination that the [date of injury], compensable injury does not extend to brain atrophy and dementia pugilistica.

We affirm the hearing officer's determination that Dr. F was not properly appointed as a designated doctor in accordance with Section 408.0041 and Rule 127.5 to address the issue of extent of injury.

We reverse the hearing officer's determination that the self-insured filed its dispute for death benefits in a timely manner pursuant to Rule 132.17 and render a new decision that the self-insured did not file its dispute for death benefits in a timely manner pursuant to Rule 132.17.

We reverse the hearing officer's determination that the decedent's death was not a result of the compensable injury sustained on [date of injury], and render a new determination that the decedent's death was a result of the compensable injury sustained on [date of injury], by virtue of carrier waiver pursuant to Rule 132.17(a) and (b).

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge