

APPEAL NO. 050105-s
FILED MARCH 8, 2005

This appeal after remand 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 November 23 and continued on December 9, 2004. The record was closed on December 9, 2004. The hearing officer resolved the disputed issues by deciding that the decedent's death was not a result of the _____, compensable injury and that the respondent (carrier) did not waive the right to contest the compensability of the claimed injury by not timely contesting the decedent's death in accordance with Sections 409.021 and 409.022. The appellant (claimant beneficiary) appealed, arguing that the evidence establishes as a matter of law that the carrier waived the right to contest the compensability of the claimed injury by not timely contesting the decedent's death, citing Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) and that the overwhelming preponderance of the evidence establishes that the decedent's death was the result of the use of prescription medication related to the _____, compensable injury. The carrier responded, arguing that the credible evidence presented at the CCH supports the hearing officer's determination that the decedent's death is not compensable. Additionally, the carrier argues that the facts of Downs, *supra*, are distinguishable and further that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.17 (Rule 132.17) specifically allows a carrier 60 days to investigate and dispute the compensability of a death.

DECISION

Affirmed as reformed.

The parties stipulated that the decedent sustained a compensable injury on _____, and that the decedent's date of death was (date of death). The claimant beneficiary testified that the decedent injured his low back in the incident of _____, and the evidence reflected that the decedent had back surgery on February 16, 2001. It was undisputed that the claimant was prescribed various medications throughout the treatment for his compensable injury. The amended death certificate in evidence listed the immediate cause of the decedent's death as combined toxic effects of hydrocodone, alprazolam, diazepam, citalopram, amitriptyline, and carisoprodol.

WAIVER

The hearing officer's finding that the carrier accepted a compensable injury of _____, and paid benefits was not appealed. Nor were the findings that the carrier received written notice of a death claim on July 2, 2002, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the compensability of a death claim on August 13, 2002, appealed. We note that however,

Finding of Fact No. 5 contains a typographical error as to the year notice was received and we reform this finding to conform to the evidence and to read as follows: Carrier received written notice of a death claim on July 2, 2003. Additionally, Finding of Fact No. 6 also contains a typographical error as to the year the TWCC-21 was filed and we reform this finding to conform to the evidence and to read as follows: A TWCC-21 disputing the compensability of the death was filed on August 13, 2003. The claimant argues that the carrier waived its right to contest compensability of the death claim because it did not dispute within 7 days. In her background information, the hearing officer references Rule 132.17. 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(a) further provides that the carrier shall have 60 days from notification of the death or from written notice of the injury that resulted in the death (whichever is greater) to conduct its investigation. The carrier correctly notes that the instant case is distinguishable from the fact situation in the Downs case. The death claim in the instant case was not filed contemporaneously with the claimed injury but rather almost two years after the compensable injury occurred. Further, the Downs court did not construe Rule 132.17, which clarified and in a few instances replaced many of old Rule 124.3 pertinent provisions. The preamble to the adopted Rule 132.17, found at 25 Tex. Reg. 2110-2113, makes clear that the Texas Workers' Compensation Commission intended to preserve a 60-day time frame for investigating and disputing the compensability of a death, Texas Workers' Compensation Commission Appeal No. 010335, decided March 29, 2001. The hearing officer did not err in holding that the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the decedent's death in accordance with Sections 409.021 and 409.022.

DEATH CLAIM

The autopsy report listed numerous medications that were found in the decedent's system. There was evidence that a few of the medications found in the decedent's system were not being prescribed at the time of his death and further, that one of the medications the decedent had a current prescription for was not found to be in his system at the time of his death. Alcohol and marijuana were also found to be in the decedent's system, although there was no allegation that either contributed to his death. Responses to a deposition on written questions from a referral doctor, (Dr. E), who provided treatment to the decedent, were in evidence. Dr. E through his deposition on written questions, testified that the following were medications that the decedent would have been taking during the time period beginning December 19, 2002, and ending (date of death): Vioxx, Valium, Norco, Celexa, Elavil, Tenormin, and HCT2. Dr. E opined that there was no combination of any medication that he prescribed for the decedent that would be fatal if taken alone and in accordance with the prescription.

(Dr. J) testified at the CCH. Dr. J testified that he had reviewed the medical records and the autopsy report of the decedent. Dr. J further testified that two of the medications found in the decedent's system at the time of his death were ten times or more above their toxic level. Dr. J testified that in his opinion, the decedent misused his medications based on the findings of the autopsy.

The law supports compensation for a condition brought about by reasonable or necessary medical treatment for a work-related injury. Liberty Mutual Insurance Co. v. Pool, 449 S.W.2d 121, 123 (Tex. Civ. App.-Texarkana 1969, writ ref'd n.r.e.) noted that where an employee sustains a specific compensable injury he is not limited to compensation allowed for that injury if proper or necessary treatment undertaken therefore brings about a disabling injury to another part of the body. Additionally, Home Insurance Co. v. Gillum, 680 S.W.2d 844 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.) referenced Western Casualty & Surety Co. v. Gonzales, 506 S.W.2d 303 (Tex. Civ. App.-Corpus Christi 1974, aff'd 518 S.W.2d 524 (Tex. 1975) which stated in part: "Where disability or death results from medical treatment instituted to cure and relieve an employee from the effects of his injury, it is regarded as having been proximately caused by the injury and is compensable...." In Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993, we held that the 1989 Act supports compensation for a condition brought about by reasonable or necessary medical treatment for a work-related injury.

In Texas Workers' Compensation Commission Appeal No. 960574, decided May 3, 1996, the deceased expired as the result of a "mixed drug overdose," and the Appeals Panel affirmed the hearing officer's decision that his compensable injury resulted in his death. However, we have stated in the context of damage resulting from drugs taken for a compensable injury, damage or harm that results from the failure of a claimant to comply with doctor's instructions is not included within the scope of the original compensable injury. See Appeal No. 93612, *supra*, and Texas Workers' Compensation Commission Appeal No. 94257, decided April 18, 1994. There was evidence in the instant case to support the hearing officer's determination that the decedent was non-compliant with the use of the medications he was taking at the time of death. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer as reformed.

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

**RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge