

APPEAL NO. 950310
FILED APRIL 11, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 10, 1995, a contested case hearing was held in [City], Texas, with [hearing officer] presiding as hearing officer to consider the single issue of appellant's (claimant) correct impairment rating (IR). At the outset of the hearing, respondent (carrier) made an oral motion to dismiss for want of jurisdiction, arguing that the Texas Workers' Compensation Commission (Commission) was without jurisdiction to resolve the IR issue because of claimant's death, prior to the hearing, from causes unrelated to the compensable injury. The hearing officer determined that he did not have jurisdiction to decide claimant's IR in light of claimant's death and dismissed the case. Claimant's wife filed an appeal asking that the hearing officer's decision be reversed and the cause remanded for the hearing officer to determine the IR issue. Carrier's response requests affirmance, arguing that the hearing officer correctly decided that he was without jurisdiction to resolve the substantive issue of claimant's IR. Claimant's widow filed a reply to carrier's response, which was untimely filed under Section 410.202 and, therefore, is not considered in making this decision.

DECISION

We reverse and remand.

It is undisputed that claimant sustained a compensable injury on [date of injury]. On April 24, 1994, a benefit review conference was held and the parties agreed that claimant reached maximum medical improvement (MMI) on July 13, 1993; however, they were not able to resolve the IR dispute. Apparently, claimant was assigned a 22% IR by his treating doctor, [Dr. P] and a 14% IR by the Commission-selected designated doctor, [Dr. M]. The hearing was initially scheduled for June 6, 1994, but was reset for August 17, 1994, by the Commission, because an ombudsman was not available to assist the claimant on June 6th. On August 12, 1994, claimant died from a cause unrelated to the compensable injury. At the August 17th hearing, claimant's widow was granted a continuance to October 17, 1994. On October 17th, claimant's widow again requested and received a continuance until January 10, 1995. At the January 10th hearing, carrier's attorney made an oral motion to dismiss for want of jurisdiction, which the hearing officer granted.

In its response, carrier argues that claimant's cause of action does not survive his death and that his widow and two children are without standing to pursue his claim for workers' compensation benefits. We agree that pursuant to Section 408.121(a)(2), the decedent's entitlement to impairment income benefits (IIBS) ends on "the date of the employee's death." However, contrary to carrier's assertion, that provision does not end the inquiry in this case. While the right to future IIBS ends at the date of death, it does not follow that the Commission loses jurisdiction at that point nor does it follow that the decedent's beneficiaries are without standing to pursue past or accrued benefits. Rather

Section 408.121(a)(2) must be considered in conjunction with Section 408.081(c) which provides:

An employee's entitlement to income benefits under this chapter terminates on the death of the employee. An interest in future income benefits does not survive after the employee's death.

The commentary to this section of the statute states:

Entitlement to income benefits terminates on the death of the employee. However, the estate of a deceased employee may recover unpaid income benefits that accrued prior to the death of the employee.

1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM, § 4.21(b) at 4-85 (1991) (emphasis added). We also refer to the commentary to Section 408.002 (formerly Art. 8308-4.03), which states in relevant part that "[t]here is no substantive change from the prior law on survival of a cause of action." MONTFORD, § 4.03, at 4-39.

Under the prior law, it was well settled that, except in the case of a specific injury, when an employee died of causes unrelated to the compensable injury "the only claim that survived his death was one for benefits accrued and unpaid from the date of his injury until the date of his death." Antwine v. Dallas Independent School District, 698 S.W.2d 226, 228 (Tex. App.-Dallas 1985, writ ref'd n.r.e.). See also Bailey v. Travelers Insurance Co., 383 S.W.2d 562 (Tex. 1964); Burris' Estate v. Associated Employers Insurance Co., 374 S.W.2d 223 (Tex. 1963); Fitzhugh v. Associated Indemnity Corp., 746 S.W.2d 361 (Tex. App.-Eastland 1988, no writ).

The hearing officer incorrectly determined that he was without jurisdiction to address the issue of claimant's IR. Although the entitlement to future benefits ended on the date of claimant's death, entitlement to unpaid, accrued benefits, if any, was not extinguished. In this instance, the designated doctor assessed an IR of 14%. Thus, if that rating is adopted by the Commission, claimant, or rather more to the point his estate, is entitled to 42 weeks of IIBS payments. See Section 408.121(a)(1). If the carrier has not already paid IIBS based on the designated doctor's rating, claimant's estate could pursue a claim for whatever portion of those benefits were accrued and unpaid as of the date of claimant's death. Additionally, we note that more than 42 weeks have passed since claimant's July 13, 1993, date of MMI. Thus, even if the carrier has paid 42 weeks of IIBS based on the designated doctor's rating, to the extent that claimant's representatives are able to demonstrate that the great weight of other medical evidence is contrary to the IR of the designated doctor such that the Commission were to adopt the treating doctor's 22% rating, claimant's estate could maintain a claim for additional unpaid, accrued IIBS, from the date of the expiration of the 42-week period to the date of death, August 12, 1994.

The hearing officer incorrectly determined that he did not have jurisdiction to consider the issue of claimant's IR given claimant's intervening death from causes unrelated to the compensable injury. The hearing officer retained jurisdiction to determine whether any unpaid, accrued benefits exist in this case and the extent of any such benefits. Accordingly, we reverse the hearing officer's decision and order and remand the case to determine if any unpaid, accrued benefits are due and owing to claimant's estate in a manner consistent with this opinion. 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 the request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge